IN THE HIGH COURT OF SOUTH AFRICA
[WESTERN CAPE HIGH COURT, CAPE TOWN]

Case no: A734/2010

In the matter between:

ABRAHAM JOHANNES VAN ALMENKERK Appellant

v

STANMAR MOTORS (PTY) LTD Respondent

JUDGMENT : 19 SEPTEMBER 2012

Le Grange, J:-

[1] I had the opportunity to read the judgment prepared by Traverso DJP. I agree that the facts in the present instance are not complicated. The difficulty in my view however arises in the approach and application of these uncomplicated facts to the law. The court *a quo* per Louw J (who granted the appellant leave to appeal) applied the so-called reliance theory to the evidence he accepted. In doing so, he concluded that despite the Appellant's 'genuine belief' that an agreement with the Respondent was

concluded, the salesperson, Gericke, despite his outward manifestation, never intended to bind the Defendant to the agreement contended for by the Plaintiff. Traverso DJP, for the reasons advanced, agrees with the approach adopted by Louw J and arrived at the same conclusion.

[2] I hold a different view and differ on the outcome, for the reasons set out herein. I will refer to the parties, as they were described in the Court *a quo*, namely the Appellant will be referred to as the Plaintiff and the Respondent will be referred to as the Defendant.

[3] The following facts relevant to this appeal are common cause between the parties. On 26 March 2007 at the premises of the Defendant a verbal agreement was entered into between the Plaintiff and the Defendant, who was represented by a Mr Jannie Gericke (*'Gericke'*), in terms of which the Plaintiff bought the new vehicle (Mercedes-Benz S65 AMG) for R1 740 000.00 from the Defendant. The vehicle arrived at Stanmar on 5 June 2007. The Plaintiff would not take delivery of the said vehicle before the issue of the value of the trade-in of his 2003 Mercedes-Benz S55 was determined. During June 2007 the Plaintiff traded in his S55 for the new vehicle. The Defendant sold the trade-in vehicle for R307 017.54 on 15 August 2007. The Plaintiff applied R300 000.00 in reduction of the purchase price of the new vehicle leaving a balance of R1 440 000.00, which was paid to the Defendant in four payments. The person who represented the Defendant in concluding the oral agreement with the Plaintiff in respect of the trade-in was Gericke.

[4] Before dealing with the approach adopted by the court *a quo* and the reasons advanced by Traverso DJP, it is perhaps necessary to re-examine the pleadings of both the Plaintiff and the Defendant.

[5] The Plaintiff's particulars of claim in respect of the oral agreement were framed as follows:

> *'(i) The purchase price of the new vehicle was R1 740 000,00;*
>
> *(ii) Mr. Gericke, on behalf of the defendant, indicated that he would be able to sell the trade-in vehicle for R500 00,00 perhaps R550 00,00. The plaintiff contends that as Mr. Gericke indicated that Stanmar could not "carry" the entire amount of R500 000,00, it was agreed that R300 000,00 would be set off against the purchase price of the new vehicle and the balance of R200 000,00 would be paid to the plaintiff once the vehicle had been sold.'*

[6] The Defendant, on the other hand, contended in its Plea that the terms of the agreement were the following:

> *'(i) That the defendant would attempt to sell the plaintiff's Mercedes-Benz S55 motor vehicle belonging to the plaintiff;*
>
> *(ii) The defendant's representative indicated that it would probably be able to sell the trade-in vehicle for R300 000,00. This amount would be used as part-payment of the purchase price of R1,740,000.00 owed by the plaintiff to the defendant in respect of the Mercedes-Benz S 65 AMG motor vehicle;*
>
> *(iii) In the event of the defendant not being able to sell the trade-in vehicle for R300 000,00 on behalf of the plaintiff, but for a lesser amount, such lesser amount shall be deducted from the purchase price of R1,740,000.00 for the Mercedes-Benz S 65 AMG motor vehicle;*

(iv) In the event of the defendant being able to sell the trade-in vehicle for more than R300,00.00 on behalf of the plaintiff, the defendant would be entitled to retain as commission the amount with which such purchase price exceeds the amount of R300,000.00'.

[7] It is evident from the manner in which the pleadings were framed that Gericke had the necessary authority to enter into an oral agreement with the Plaintiff regarding the sale of the Plaintiff's S55 trade-in vehicle. It is also not in dispute that one of the terms of the agreement is the defendant would attempt to sell the S55 vehicle and that such monies would be used as part-payment of the purchase price of the new vehicle purchased by the Plaintiff. The only real issue in dispute, in my view, was whether it was agreed that the S55 as a trade-in vehicle will be sold for not less than R500 000,00 as contended by the Plaintiff, or R300 000,00, as contended by the Defendant.

[8] Having considered the evidence, the court *a quo* came to certain findings and based on the 'reliance theory' dismissed the Plaintiff's claim. The ultimate finding was that despite Plaintiff's genuine belief that he had an agreement with the Defendant that he would receive R500 000,00 for the S55 vehicle and despite Gericke's outward manifestation that the Plaintiff might receive R500 000,00, Gericke did not have the intention to bind the Defendant.

[9] I have no difficulty with the manner in which Louw J applied the reliance theory. My concern and where I part ways with the reasoning of the court *a quo* and Traverso DJP, is that if the Plaintiff's version as to the factual events is to be accepted, as both the court *a quo* and Traverso DJP did, and in my view correctly so, it does not leave

room to conclude that Gericke subjectively never intended to bind the Defendant. Moreover, even if the reliance theory is applicable to the present facts, there is, according to me, sufficient evidence to demonstrate that Gericke did in fact bind the Defendant as contended for by the Plaintiff.

[10] On a proper evaluation of the evidence as a whole, there can be no doubt that Gericke's denial that he ever discussed, before the plaintiff's departure to Belgium, the price at which the S55 would be sold or traded in, because he was not part of the used car division, is nonsensical. In cross-examination Gericke was asked who dealt with the Plaintiff regarding the value on the S55 as trade-in. His reply, in no uncertain terms, was that it was only himself and the Plaintiff who dealt with the entire transaction. The evidence of the Plaintiff and his witness, Coulier, that Gericke did make the promise to sell the Plaintiff's vehicle for R500 000,00, trying for R550 000,00, was in the result correctly accepted by the court *a quo* as the more plausible version.

[11] I will now deal with some of the further findings made by the court *a quo* and will return later to the reasons advanced by Traverso DJP for the conclusion she reached. At page 307 of the record, the following is recorded:

> *'I am satisfied, however, having seen Mr. Gericke give 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.'*

At page 308 the following is recorded:

> *'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.'*

[12] If I am correct, my understanding of these findings is that Gericke as 'an essentially honest man' never intended to conclude the agreement as contended for by the Plaintiff because the system of Stanmar regarding their trade-ins of vehicles exclude the kind of agreement the Plaintiff is relying on.

[13] The Plaintiff's version is a simple one. Gericke made a *bona fide* commercial promise that he would sell his S55 for 'R500 000,00 trying for R550 000,00' and, at the time and place when the promise was made, the Plaintiff accepted it. The suggestion that Gericke, despite his outward conduct and utterances, never intended to bind the Defendant because of the internal workings regarding trade-in vehicles at Stanmar is at odds with the pleadings. There is no suggestion on the pleadings that Gericke lacked the necessary authority to bind the Defendant. In fact, on Gericke's evidence, the internal system of Stanmar was not followed as the S55 was valued even before it was seen by personnel in the second-hand car division. The internal workings regarding Stanmar's trade-in vehicles are therefore irrelevant in the consideration of the real issue in dispute. Furthermore, there is no suggestion on the evidence that the Plaintiff was aware of the internal workings of Stanmar. It is also unthinkable to suggest that, in these circumstances, a reasonable person in the shoes of the Plaintiff must have or ought to have been aware of such internal workings. There is also no suggestion there was a unilateral mistake, or misrepresentation, on the part of Gericke when he represented the Defendant. Moreover, if Gericke impressed the court *a quo* as being essentially an 'honest man' it is inconceivable to suggest that the Plaintiff ought to have had a different view of him taking into account his 42 years working experience at Stanmar. There is also no suggestion that what Gericke had promised was of such a

nature that any reasonable person would have been alive to the unlikelihood of the claim made, and would have enquired further or spoken out. In fact, on Gericke's own version, the Plaintiff informed him that he had phoned around and made some enquiries about the value of the S55.

[14] The evidence of Gericke contains a number of inconsistencies and, as the court *a quo* put it, he 'had to back track during his evidence on a number of aspects'. Gericke's version even differs from the terms of the agreement put forward by the Defendant in its pleadings. This difference, in my view, clearly demonstrates that the commercial deal between Gericke and the Plaintiff could only have been as suggested by the Plaintiff. On the proven facts, Gericke did in fact promise to sell the S55 in the manner and on the terms as contended for by the Plaintiff. Logic and common sense, in my view, dictate that, in the present instance, the acceptance of the Plaintiff's version as to the factual events must inevitably exclude the version of the Defendant, as the two versions are mutually exclusive. It follows in my view that Gericke's version and that of the Defendant's should have been rejected, and that Gericke did indeed have the intention to bind the Defendant.

[15] As mentioned previously, the court *a quo* correctly accepted that Gericke did say he would sell the S55 for R500 000, trying for R550 000. My difficulty arises where the following is recorded at page 309.

> '*...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.'*

[16] In my view, the evidence and probabilities in this instance do not support the assessment that Gericke did not wish to be confrontational and just went along with the plaintiff's demand. In fact, the probabilities rather favour that Gericke, in plain, simple and unambiguous terms, made the promise to sell the S55 for the amount as contended by the Plaintiff. He has been in the business of selling cars at Stanmar for 42 years. It is inconceivable that a man with his years of experience will just 'go along' with a client's unrealistic demand which he knows full-well cannot be fulfilled, for fear of 'being confrontational'. Moreover, according to the evidence of the plaintiff, it was Gericke who first told him that the value of the S55 was between R550 000 - R600 000 when they discussed the purchase of a new vehicle and the trade-in. (See record vol 1: 67). The further undisputed evidence is that the Plaintiff thereafter did some research and established that the value of the S55 is between R550 000 and R600 000. A car magazine called "Car Trader" also had the same car advertised for sale at R600 000.

[17] The further finding that Gericke was 'not in a position nor did he intend to give a warranty and to bind Stanmar contractually' to that price, despite his 'outward appearance that he was consenting to such a contractual term on Stanmar's behalf', is in my view contrived. So, too, was the court's reliance on the Supreme Court of Appeal decision of Sonap.

[18] In accepting that Gericke did in fact say he would sell the S55 vehicle for R500 000,00, trying for R550 000,00 and taking into account what had been pleaded by the Defendant, no logical basis exists not to accept, on a balance of probabilities, that Gericke made a *bona fide* commercial offer in plain and unambiguous language without any reservation. This offer was accepted by the Plaintiff, acting in good faith. On these facts, which were accepted by the court *a quo*, and in the absence of a mistake or misrepresentation made by Gericke, it is rather difficult to understand why the court *a quo* did not find that it was Gericke's intention to bind the Defendant.

[19] The court *a quo* however reasoned differently and was of the view that the Supreme Court of Appeal, in Sonap Petroleum SA (Pty) Limited v Pappadogianis 1992 (3) SA 234, considered the kind of situation that we are faced with in the present instance. I find this reasoning by the court *a quo* misplaced. The facts in the present instance are significantly different from the facts in the Sonap matter. In the Sonap matter the Appellant sought rectification of the addendum to the agreement concluded between itself and the Respondent, alternatively, it sought an order that the addendum be declared void based on unilateral mistake pleaded by the Appellant. In the present matter, the Defendant has not sought to avoid the agreement with the Plaintiff based on a mistake or misrepresentation made by Gericke. More importantly, there is no suggestion by the Defendant that the Plaintiff should have been alive to, or reasonably ought to have been alive to, the fact that the promise made by Gericke could not have been true and that a reasonable person would have enquired further or would have spoken out about it. Furthermore, there was no evidence to suggest that the Plaintiff was aware of the internal workings of the Defendant, namely that the price for the

trade-in could only be determined after the second-hand division had seen the vehicle. During the cross-examination of the Plaintiff, the internal workings of the Defendant were never put to him, nor was it put to him that he should have realised that Gericke could not offer him R500,000.00 trying for R550,000.00. In fact, on the pleadings, it is common cause that Gericke was the duly authorised representative of the Respondent.

[20] In my view the approach adopted in South African Railways & Harbours v National Bank of South Africa Limited 1924 AD 704 at 715-716 is apposite in the present instance where the following was held:

> *"The law does not concern itself with the working of the minds of parties to a contract, but with the external manifestation of their minds. Even therefore if from a philosophical standpoint the minds of the party do not meet, yet, if by their acts their minds seem to have met, the law will, where fraud is not alleged, look to their acts and assume that their minds did meet and that they contracted in accordance with what the parties purport to accept as a record of their agreement. This is the only practical way in which Courts of law can determine the terms of a contract."*
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> See further Wessels Law of Contract in South Africa, Vol. I, par 62 and Trollip v Jordaan 1961(1) SA238 SCA at 248G-249A.

[21] The Defendant, as mentioned in paragraph [19] herein, did not rely on fraud, mistake or rectification as factors that could have precluded an agreement being reached.

[22] This having been said, even if the reliance theory is appropriate and applicable in this instance, the factors mentioned by the court *a quo* properly considered cannot favour the Defendant.

[23] The sum total of the factors relied upon by the court *a quo* to find against the plaintiff were the following: *'It would have been clear to a reasonable person that Gericke was discussing the trade-in of a motor-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 real doubt in the mind of the reasonable person that Gericke intended to bind Stanmar to a price of at least R500 000.'*

[24] In the Sonap case (see *supra* at 234I-J), the court found that the decisive question was whether a party whose actual intention did not conform with the common intention expressed led the other party, as a reasonable person, to believe that the former's declared intention represented his actual intention. The Court, in answering this question, adopted a three-fold enquiry. Firstly was there a misrepresentation as to the offeror's intention? Secondly, who made the misrepresentation? Finally, was the offeree misled thereby? The last question postulates two possibilities: was the offeree misled, and would a reasonable person have been misled?

[25] In this instance, if it is assumed that a misrepresentation was made, it was Gericke's statement that was the misrepresentation; and it was the plaintiff who was misled thereby.

[26] The only remaining question is whether a reasonable person in the position of the Plaintiff would have been misled. With regard to the reasonableness of the belief held by the Plaintiff the court *a quo* made the following assessment: *'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.'* I agree with this assessment. The Plaintiff did not merely accept the mere say so of Gericke regarding the value of the S55 the first time it was mentioned. In my view, as a reasonable person, he made certain enquiries of his own. His own evidence was that he had established from a car magazine that the retail price of the trade-in was R600 000.00. In addition thereto, he had found a purchaser who was prepared to pay R450 000.00 for the trade-in. Furthermore, as stated previously, there is no evidence that the Plaintiff was aware of the internal workings of the Defendant, namely that a price for the trade-in could only be determined after the trade-in had been seen by the second hand division, nor were the internal workings of the Defendant ever put to him. It was also not put to the Plaintiff that he should have realised that Gericke could not offer him R500 000.00 trying for R550 000.00. I am satisfied that it is plausible that a reasonable man in the circumstances of the Plaintiff would also have been misled by Gericke.

[27] I now turn to deal with the further reasons advanced by Traverso DJP which in her view 'fly in the face' of the conclusion that the agreement as contended for by the plaintiff was in fact concluded. The following was recorded in paragraph [17] of the prepared judgement:

> *'17.1 It would mean that the defendant would make a loss of R100 000,00 on the deal.*

17.2 The trade-in value of the S55 had not yet been determined by the second-hand car division and there was no book value to go by.

17.3 The fact that the vehicle was valued at a certain price in some car magazine, takes the matter no further. That was in respect of a new vehicle, and in any event that evidence has little evidential value.

17.4 Ms Coulier was not prepared to go as far as to say that an agreement had been entered into regarding the R500 000,00. The high water mark of her evidence is that a discussion took place. This is, in my view, significant.

17.5 It seems inconceivable that any reasonable person would allow a document to be formulated in writing which reflects the trade-in value of a vehicle as R300 000,00 if the deal was for R500 000,00 without any written record hereof. It is further inconceivable that a reasonable person will pay the full purchase price of the vehicle (less only R300 000,00) if in fact he is only liable for R1 440 000,00.'

[28] At the time the Plaintiff accepted the promise made by Gericke, it is highly unlikely that a reasonable person would have foreseen that the Defendant would suffer a financial loss on the transaction. Furthermore, the financial loss is not an objective factor to determine the reasonableness of the Plaintiff in the present instance. It is not unusual for a business such as the Defendant's to suffer certain losses for commercial purposes. According to Gericke, if the S55 was sold for less than R300 000, it would have been the Defendant who would have to make up the difference. Moreover, Karandis (from Mercedes-Benz South Africa) admitted that certain dealers do get trade assistance, although he stated that it did not happen in this case. In fact as an example, he also referred to an instance whereby dealers can offer a 'sport kit' on a C-Class Mercedes-Benz to the value of R40 000 and the customer only pays R12 000 for it.

[29] Much has been made of the fact that, at the time of the agreement, the value of S55 was not yet determined by the second-hand car division and there was no book value to go by. This consideration in my view is irrelevant in determining whether the Plaintiff acted as a reasonable person when he accepted the offer made by Gericke. The S55 vehicle was not unfamiliar to Stanmar. Gericke sold the vehicle to the Plaintiff in 2003. It had a full service history with Stanmar. Gericke had often seen the vehicle when it was brought in for its services. At the same time the Plaintiff did not merely accept the value of the vehicle at the first opportunity when Gericke mentioned the figures of R550 000 – R600 000. He did his own research as to the value of the vehicle, which is not in dispute. Moreover, in cross-examination, Gericke stated that the amount of R300 000 was fixed without the vehicle having been seen. Nevertheless, more importantly, the Defendant never complained that Gericke lacked the authority to bind them in respect of trade-in values of vehicles. To suggest that in these circumstances, a reasonable person would not have accepted what Gericke, a man with almost 42 years' sales experience at Stanmar, had promised would be to ignore commercial realities where parties in mutual dealings of this nature are generally expected to act in good faith.

[30] I also disagree with the notion that the vehicle's price in the car magazine takes this matter no further. The fact that the Plaintiff did his own research and had found a buyer who was prepared to pay R450 000, must be indicative of his reasonableness and his genuine belief of the value of the S55. The suggestion that the price referred to was in respect of a new vehicle and of little evidential value is in my view misplaced. Cars are bought and sold on a daily basis. It is inconceivable to suggest in the business of

buying and selling of cars a reasonable person cannot rely on the values of vehicles as they appear in car magazines, irrespective of whether they are new or second-hand.

[31] I disagree as to the significance attached to the evidence of Coulier. The court *a quo* accepted the evidence of Coulier and accepted that Gericke did say the words 'R500 000, trying for R550 000'. It is therefore inconceivable on what possible basis the 'high water mark' of the evidence of Coulier can now be a significant factor in the court's determination of whether a reasonable person in the Plaintiff's shoes would have been misled by what Gericke said. On this point, the issue, in my view, is irrelevant and cannot assist in determining the reasonableness or otherwise of the Plaintiff's conduct.

[32] The criticism levelled at the Plaintiff in paragraph [17.5] of the prepared judgment (mentioned previously) is in my view unwarranted. The evidence of the Plaintiff was clearly that in terms of the agreement an amount of R300 000.00 would be deducted from the price of the new vehicle and once the trade-in vehicle had been sold, the balance of R200 000 or more would be paid into his account. The reason advanced by the Plaintiff for this arrangement was that Gericke had informed him that Stanmar would pay upfront an amount of R300 000. To suggest that a reasonable person would have acted differently and insisted that the trade-in value of R500 000 be reflected in writing, is to ignore the *bona fide* business relationship between the Plaintiff and Gericke. It is also based on this promise by Gericke that the Plaintiff knew what amount to pay and in fact, the day following such promise, the Plaintiff made the first cash payment to Stanmar. In my view, the Plaintiff viewed this agreement in a reasonable manner and the criticism on this point is unfounded.

[33] In conclusion, to borrow from Christie's 'The law of contract in South Africa' 6th Edition', our Higher Courts have essentially adopted three theoretical bases for the enforcement of contracts: the subjective consensual theory ('wilsteorie'), which postulates that enforceability depends on the concurrence of the subjective wills of the contracting parties (*consensus ad idem*); the objective declaration theory ('verklaringsteorie'), which postulates that enforceability depends on the concurrence of the declared intentions of the parties and the reliance theory ('vertrouensteorie'), which postulates that enforceability depends on the reasonable expectations conveyed to the mind of each party by the words or conduct of the other.

[34] There is no one particular theory that has been rigidly adopted by our Higher Courts, although the reliance theory, also known as the quasi-mutual assent doctrine, has been favoured in recent decisions. In this regard see Spes Bona Bank Ltd v portals Water Treatment South Africa (Pty) Ltd 1983 (1) SA 978 (A) at 984; Sonap's case supra; Hartley v Pyramid Freight (Pty) Ltd t/a Sun Couriers 2007 (2) SA 599 SCA and Pillay and Another v Shaik and Others 2009 (4) SA 74 SCA.

[35] In Christie's 'The law of contract in South Africa' 6th Edition page 2, the following view is expressed:

> *'The Appellate Division's view on the three theories must not be misunderstood. The view expressed was obiter, not part of the reason for the decision, and our courts should not regard themselves as bound by any rigid theory. What the Appellate Division did was to define the basis on which contracts are treated as enforceable in our law. It remains as true as ever that the object of the courts is to apply and, where necessary, to develop the law in order to achieve justice.'*

[36] I am in agreement with the said views. For the reasons advanced, ordinary justice dictates that the Plaintiff's version must be favoured and judgment should accordingly have been entered in his favour.

[37] I would allow the appeal with costs and substitute the court *a quo*'s order with the following:

> '1. Judgment is granted in favour of the Plaintiff with costs.
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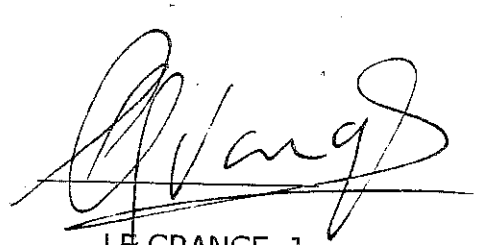
> 2. The Defendant is ordered to pay the amount of R200 000.00 to the Plaintiff with interest calculated at a rate of 15.5% a *tempora morae* from 1 November 2007 to date of payment.'



LE GRANGE, J