

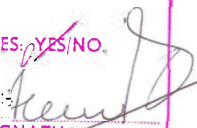
IN THE HIGH COURT OF SOUTH AFRICA

DELETE WHICHEVER IS NOT APPLICABLE (NORTH GAUTENG HIGH COURT, PRETORIA)

(1) REPORTABLE: YES/NO. ☒ YES ☐ NO

(2) OF INTEREST TO OTHER JUDGES: YES/NO. ☒ YES ☐ NO

(3) REVISED. ☐

DATE: 18/11/10 In the matter between:  SIGNATURE

CASE No. 44839/2009 18/11/2010

BARLOWORLD MOTOR RETAIL SOUTH AFRICA a division  
of BARLOWORLD SOUTH AFRICAN (PTY) LTD formerly  
registered as BARLOWORLD MOTOR (PTY) LTD t/a  
BARLOWORLD TOYOTA WITBANK

Plaintiff

and

PRELLEX 169 CC t/a MOTIQ WASH AND VALET CENTRE

Defendant

JUDGMENT

Van der Byl, AJ:-

Introduction

[1] In this matter the Plaintiff, Barloworld Motor Retail South Africa, claims, in addition to the usual order of costs, from the Defendant, Prellex 169 CC, trading as Motiq Wash and Valet Centre -

- (a) payment of a sum of R210 141,50, being the value of a motor vehicle delivered to it in terms of a contract of deposit;

- (b) interest on that amount at the rate of 15,5 per cent per annum from date of service of the summons to date of payment.

[2] As is apparent from Plaintiff's Particulars of Claim its case is based on the allegation -

- (a) that on 29 December 2006 it, represented by a certain Mr. Fourie, entered into an agreement with the Defendant, duly represented, entered into an agreement on 29 December 2006;
- (b) that in terms of the agreement the Plaintiff deposited with the Defendant a Toyota Hi Lux double cab ("*the vehicle*") to be kept by the Defendant pending a valet service to be effected upon the vehicle by the Defendant;
- (c) that the Defendant would take care of the vehicle and redeliver it to the Plaintiff upon request;
- (d) that the Plaintiff did not take care of the vehicle and failed to deliver the vehicle to the Plaintiff upon request on 29 December 2006.

[3] As is apparent from the Defendant's plea it would appear to be the Defendant's case that the terms of an oral agreement concluded between the Defendant, as represented by a certain Mr. David Lundt, and the Plaintiff, represented by a certain Mr. Jack van Rensburg -

- (a) the vehicle was delivered to the Defendant for a valet service;
- (b) the Plaintiff will see to the delivery and pick up of the vehicle in question and the risk of theft and damage will be for the Plaintiff;
- (c) the vehicle was collected by an unknown employee of the Plaintiff from Plaintiff's place of business.

**Evidence on behalf of the Plaintiff**

[4] Two witnesses testified on behalf of the Plaintiff.

[5] Firstly, there is the evidence of Mr. Jackie Roy van Rensburg who was at the time the General Manager of the Plaintiff.

He testified that he, on behalf of the Plaintiff, concluded an oral agreement with a certain Mr. Lundt on behalf of the Defendant in terms of which the Defendant would render valet services in respect of new and used vehicles sold by the Plaintiff to its customers before delivery of such vehicles to its customers. He concluded the agreement on the assurance by Mr. Lundt that the Defendant was insured against damage or theft of vehicles delivered to it for valet services. It was, furthermore, agreed that vehicles would be delivered to the Defendant together with a written official order.

On 29 December 2006 the vehicle in question, having been sold to a customer, was in

the course of the morning delivered by the Plaintiff's driver, Mr. Sipho Mavimbela, together with the agreed official order, to the Defendant for valet services.

When Mr. Mavimbela returned to the Defendant's place of business some three hours later to collect the vehicle he was informed by the lady at reception that the vehicle had already been collected by another unknown employee of the Plaintiff. A thorough search of the premises of both the Plaintiff and the Defendant revealed that the vehicle was missing, in all probability stolen.

It, furthermore, appears from the evidence that vehicles were from time to time delivered and collected by different drivers employed by the Plaintiff all dressed in a short bearing a prominent logo of Toyota.

Mr. Van Rensburg indicated that he was not aware or was his attention drawn at the time of the conclusion of the agreement to a disclaimer or exemption displayed at the Defendant's premises to the effect that the Defendant does not accept responsibility for loss or damage to motor vehicle from fire, theft or any cause whatsoever.

[6] **Secondly**, there is the evidence of Mr. Sipho Mavimbela who confirmed that he had delivered the vehicle in question to the Defendant's premises and that when he later returned to collect the vehicle he was informed by the lady at reception that the vehicle had already been collected by another employee of the Plaintiff. He also confirmed that he was not the only driver responsible for the delivery and collection of vehicles to and from the Defendant.

He, furthermore, denied that he had ever seen a disclaimer in or at premises of the Defendant.

**Defendant's evidence**

[7] **Firstly**, there is the evidence of Mr. David Jansen Lundt who was at the time a member and owner of the Defendant, who ceased doing business during 2008.

According to him he couldn't remember whether any discussions took place between him and Mr. Van Rensburg on the question whether the Defendant was insured against damage to or theft of vehicles of customers.

He, however, confirmed that they during June or July 2006 discussed the prices to be charged for the services to be rendered.

The procedure to be followed was that the Defendant would be approached with an official order at the time a vehicle was delivered for valet services together with the keys.

Furthermore, he testified that a disclaimer notice was displayed above the door at the reception area within view of all customers to read.

[8] **Secondly**, there is the evidence of Ms. Natasha Venter who was at the time employed by the Defendant at the reception desk as cashier responsible, *inter alia*, for the receipt of vehicles delivered to be washed.

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She confirmed that the vehicle in question was delivered by a driver of the Plaintiff on 29 December 2006 and that another driver later collected the vehicle. She recalled specifically that he identified the keys which were hanging against the wall amongst the keys of other vehicles that had been delivered on that day for valet cleaning. He had a shirt on bearing the Toyota logo. She was aware of the fact that the driver who delivered the vehicle was, as often happens, not the same person who delivered the vehicle.

[9] **Thirdly**, there is the evidence of Mr. Jan Adriaan Conradie who is currently employed by a business called Tiger Wheel and Tyre conducting business next to the premises where the Defendant used to conduct its business. He confirmed that he took a photograph of a disclaimer notice situated in the area which used to be the work area of the Defendant.

**Issues called for adjudication**

[10] As it became apparent in the course of argument, it appeared that the only basis on which the Plaintiff based its claim solely on the principles applicable to contracts of deposit is, leaving aside the issues pertaining to the disclaimer and the Defendant's insurance.

[11] A contract of deposit has been held to be a contract "... whereby one person delivers to another a thing to be kept by him gratuitously or for reward" and undertakes to take care of the thing and to restore it on demand (see: **Minister of Posts & Telegraphs v Daddy Bros and Johnstone (Pty) Ltd 1965 (3) SA 394 (E) at 396B-D**;

**LAWSA, The Law of South Africa, Second Edition, Volume 8, Part 1, para 174).**

[12] It is trite that a depositary is, because of the duty imposed upon him or her to keep the property under his or her control, to preserve it, and in due course to restore it intact, *prima facie* liable to compensate the depositor for the loss of or damage to the property left with him by the depositor unless he or she proves that he or she took all reasonable care of the property which the circumstances demanded, but that it was lost or damaged in spite of his or her diligence (see: **Govt of the RSA (Department of Industries) v Fibre Spinners & Weavers (Pty) Ltd 1977 (2) SA 324 (D) at 331D**).

[13] In this matter the evidence shows that by virtue of the agreement concluded between the Plaintiff and the Defendant vehicles were in practice delivered by one or other of Plaintiff's employees to the Defendant together with an official order for valet services and were later collected by the same or any other employee. These employees seem always to be identified by way of a shirt bearing the Toyota logo.

[14] This is exactly what happened on this particular day. The Plaintiff's employee, Mr. Sipho Mavimbela, delivered the vehicle in question on this particular together with an official order and left the key with the Defendant's employee, Ms. Venter. According to Ms. Venter another employee wearing a shirt with the Toyota logo arrived to collect the vehicle. She delivered the vehicle to him with the key which he, incidentally, identified himself where it was hanging on a hook against the wall together with the keys of other vehicles delivered to the Defendant to be washed or valeted. Whether or not this person was an employee of the Plaintiff and, if so, whether or not he had stolen the

vehicle is unknown. I cannot see how the Defendant can under the circumstances be blamed for having delivered through Ms. Venter, the vehicle to this person.

[15] Mr Rome who appeared on behalf of the Plaintiff submitted, relying on precedents set out in **Amler's Precedents of Pleadings, Seventh Edition, p. 173** and **Strelitz (Pty) Ltd v Siegers & Co (Pty) Ltd 1959 (3) SA 917 (E) at 918G**, that the Defendant should have alleged and proved that the loss of the vehicle was not occasioned by its neglect.

[16] In my opinion the allegation and evidence that the vehicle was returned in the circumstances pleaded and proved by way of evidence clearly shows absence of negligence.

[17] The allegation in the Defendant's plea that the vehicle was returned to an employee of the Plaintiff, albeit an unknown one, clearly implies absence of negligence. I cannot in the context of the circumstances of this matter see any need for the Defendant to have explicitly added that in those circumstances the loss of the vehicle cannot be attributed to any negligence on its part. It speaks for itself. An allegation that the vehicle was returned to an employee of the Plaintiff is a clear allegation that it had been properly returned in the ordinary course of events.

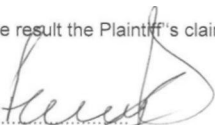
[18] The evidence adduced on behalf of the Defendant supports the allegations contained in the plea. The evidence showed that the vehicle was indeed delivered in accordance with a practice followed in all cases, namely, delivery by an employee

*J.*

dressed in a shirt bearing the Toyota logo together with the official order and the collection later of the vehicle by another person similarly dressed. No cross-examination was directed at any of the witnesses in order to determine or allege any negligence on the part of the Defendant or its employees and I am unable to find any such negligence.

[19] I am accordingly satisfied that the loss of the vehicle can not be attributed to any negligence on the part of the Defendant.

In the result the Plaintiff's claim is dismissed with costs.

  
P C VAN DER BYL  
ACTING JUDGE OF THE HIGH COURT

ON BEHALF OF THE PLAINTIFF

ADV G B ROME

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DATE OF HEARING  
JUDGMENT DELIVERED ON

16 November 2010  
18 November 2010