IN THE HIGH COURT OF SOUTH AFRICA

FREE STATE DIVISION, BLOEMFONTEIN

Reportable: YES/NO
Of Interest to other Judges: YES/NO
Circulate to Magistrates: YES/NO
Case number: **2376/2021**

In the matter between:

PARK MOTORS WELKOM (PTY) LIMITED Plaintiff

and

MONTANA GENERAL TRADING 196 CC Defendant

CORAM:	LOUBSER, J
HEARD ON:	14, 15 & 17 NOVEMBER 2023, 23 & 24 JANUARY 2024
JUDGEMENT BY:	LOUBSER, J
DELIVERED ON:	4 APRIL 2024

[1] This is an action in which the Plaintiff claims from the Defendant the amount of R550 000.00 plus interest and costs of suit in terms of the common law implied warranty against eviction. It is alleged in the summons that the Defendant sold a motor vehicle to the Plaintiff, but that the South African Police Service attached the vehicle some 18 months later as being a stolen vehicle.

[2] The Pleadings:

In the particulars of claim to the summons, the Plaintiff allege that on 10 May 2017 at Kroonstad, alternatively Welkom, the Plaintiff and the Defendant concluded a verbal agreement of sale. In terms of the agreement, the Plaintiff purchased from the Defendant a 2017 Isuzu double cub vehicle for the amount of R550 000.00. At the time of the conclusion of the agreement, the Plaintiff was represented by Hennie Britz and the Defendant was represented by Neels Hamman alternatively L.J. Fouche. It was an implied term of the agreement that the Defendant warranted to the Plaintiff that the Plaintiff would not be evicted, alternatively that no third party who had an unassailable claim or title in respect of the vehicle, would evict the Plaintiff.

[3] It is further alleged that the Defendant delivered the said vehicle to the Plaintiff on the same day, namely 10 May 2017. The Defendant also rendered an invoice to the Plaintiff, which caused the Plaintiff to pay the purchase price to the Defendant, still on the same day. The said invoice was attached to the summons.

[4] On the same day the Plaintiff sold the vehicle to Petrus Johannes Hamman in terms of a verbal agreement of sale. For this purpose Hamman obtained financing from Standard Bank, with whom he concluded a written instalment sale agreement. In terms of this agreement, Hamman would become owner of the vehicle upon payment of the full purchase price to Standard Bank. On 13 December 2017 Hamman sold the vehicle to Midcity Motors, and two days later Midcity Motors sold the vehicle to F.H. Briedenhann, who concluded a written instalment sale agreement with Wesbank for the purchase of the vehicle. On 16 October 2018 the police took possession of the vehicle as being a stolen vehicle. The claim of the police to the vehicle was unassailable, it is alleged in the summons.

[5] Lastly, it is stated in the summons that when the police attached the vehicle, and as a result of Briedenhann being evicted as aforesaid, all the successive sellers of the vehicle were held liable to repay the purchase price to the successive purchasers of the vehicle, the claims of such purchasers being unassailable. It is consequently alleged in the summons that the Defendant is also liable to repay the purchase price to the Plaintiff in terms of the common law implied warranty against eviction.

[6] In its Plea to the Summons the Defendant denied the particulars of the Plaintiff as set out in the Particulars of Claim. It is further denied that mr. Neels Hamman

had any legal authority to act on behalf of the Defendant, but it is pleaded that "a mr. Hamman" sold the Isuzu. It is also denied that the invoice attached is an original invoice from the Defendant as issued by the Defendant. Most of the remaining allegations in the Summons are then admitted by the Defendant, save to say that the Plaintiff only reimbursed Midcity Motors in the amount of R420 000.00.

[7] This Plea filed by the Defendant prompted the Plaintiff to file a Replication thereto, firstly persisting in its allegation that it was the Defendant who sold the vehicle to the Plaintiff, represented by its duly authorised agent, mr. Neels Hamman. Secondly, the Plaintiff stated that the Defendant is estopped from denying that it was the Defendant who had sold the vehicle, and is also estopped from denying that Hamman had any legal authority to bind the Defendant contractually with the Plaintiff.

[8] Responding to a request for Further Particulars in terms of Uniform Rule 21, the Defendant stated that mr. Neels Hamman was never employed by the Defendant. It further stated that the account with number 1[…] is a Nedbank account held by L. J. Fouche (Jnr), and that the payment in the amount of R102 000.00 was made on the 19th May 2017 by the account holder Louis Fouche (Jnr). The relevance of this account and its holder will transpire later herein.

[9] In the minutes of a pre-trial conference held by the legal representatives of the parties, it was agreed that the issues for trial are, amongst others, whether or not Neels Hamman represented the Defendant, and if he did not represent the Defendant, whether the Defendant is estopped from raising such as a defence.

[10] <u>The Evidence</u>

The first witness to testify for the Plaintiff was mr. Hennie Britz, the sales executive of the Plaintiff at the time. He testified that mr. Neels Hamman told him there is an Isuzu at the Defendant which he wanted to buy. However, the Defendant could not assist him with financing for the vehicle. He further informed him that he had already agreed the price for the Isuzu with mr. Fouche of the Defendant, who was a director of the Defendant. He, the witness, knew mr.

Fouche, since he was an erstwhile client of the Plaintiff. The witness then requested documents for the Isuzu from mr. Fouche, amongst others the police clearance certificate, the Natis document and the invoice for the vehicle. Mr. Fouche never indicated to him that they were not aware of the transaction, the witness testified.

[11] The witness further testified that mr. Neels Hamman informed him that his brother, mr. P.J. Hamman, was actually the person who wanted to buy the Isuzu. When he received all the said documents from Fouche and Neels Hamman, the documents were forwarded to Standard Bank together with the application for finance. On this document, P J Hamman was indicated as the purchaser, and the Plaintiff the owner at that point in time. The invoice showed that the Plaintiff had purchased the vehicle from the Defendant. The invoice came directly from Fouche. All these things happened on 10 May 2017. The vehicle was in the possession of the Plaintiff at its premises before it was delivered to P.J. Hamman.

[12] The witness said that he only knew one Louis Fouche. He was not aware of any Louis Fouche Junior. In cross-examination it was put to the witness that the two Louis Fouches, Senior and Junior, were the two active members of the Defendant at the time of the transaction. The witness responded by saying that he never spoke to Fouche Junior. He never saw him. He only spoke to Fouche Senior on his cell phone. It was further suggested to the witness that the invoice he received did not come from the Defendant, since the account number on the invoice was in fact the personal account number of Fouche Junior. The Defendant never sold cars, but Fouche Junior did. It needs mentioning here that the invoice in question bears the name of the Defendant in bold letters at the top thereof. It also needs mentioning that the witness gave evidence regarding a Land Rover vehicle that was traded in by P.J. Hamman when he purchased the Isuzu from the Plaintiff. This Land Rover went to the Defendant, and the Plaintiff had to pay an amount of R109 614.00 to the Defendant to complete the deal. The significance of this evidence appears to be that R109 614.00 was paid into the account indicated on the Defendant's invoice, which now appears to have been the personal account of Fouche Junior. Responding to this information, the

witness testified that the Plaintiff was made to believe that the Defendant was the seller, on the face value of the invoice, and on the basis of the conversation the witness had with Fouche of the Defendant.

[13] It was further put to this witness in cross-examination that Neels Hamman and P.J. Hamman cannot be traced, while Fouche Senior had already passed on in April 2020, and Fouche Junior had passed on in January 2022.

[14] The Plaintiff then called a second witness to testify, namely mr. Mark Parodi, a director and shareholder of the Plaintiff. He testified that Midcity Motors had instituted action against the Plaintiff when it transpired that the Isuzu was a stolen vehicle. (It was mentioned earlier herein that Hamman had sold the Isuzu to Midcity Motors). According to this witness, the matter between Midcity Motors and the Plaintiff became settled. In terms of the settlement, the Plaintiff had to pay Midcity Motors the amount of R550 000.00. It is this amount that the Plaintiff now claims from the Defendant. The witness concluded that he was not involved in the transaction between the Plaintiff and the Defendant. In cross-examination the witness conceded that the Plaintiff never became the registered owner of the vehicle.

[15] The Plaintiff did not call further witnesses to testify, and closed its case after presenting the evidence of this witness.

[16] Two witnesses were thereafter called to testify for the Defendant. The first was mrs Annelie Fouche, the widow of mr. Louis Fouche Junior and since January 2022 the only member and shareholder of the Defendant close corporation. She holds a B.Com Honours degree from Potchefstroom University and a National Diploma in Financial Management from the Free State University. She testified as follows:

[17] She had known the Fouche family since 2014, and in 2015 she became the financial officer of the Defendant. She and Fouche Junior were married to each other in 2016. The Defendant does business as a registered micro lender since

2002. It can provide loans to a maximum of R8 000.00 and the period for repayment of the loan is 3 months. The business later moved to Wespark in Kroonstad. In one of the garages on the premises, Fouche Junior stored items related to the pawn business which he operated in his own name.

[18] During 2017 Fouche Senior and Fouche Junior were the only two shareholders of the Defendant. Before 2014 Fouche Senior underwent hip-surgery, and thereafter he could only walk with the aid of a walking frame and he could no longer drive a motor vehicle. In 2017 he was admitted to Rosepark Hospital, and in 2018 he terminated his involvement with the Defendant. He passed on in April 2020 when he was already in his eighties. It is impossible that the witness Britz could have done any business with Fouche Senior in 2017. When Fouche Senior left the business in 2018, she and the daughter of Fouche Junior purchased Senior's 50% shareholding of the business. The following year Junior was diagnosed with cancer, and in 2020 his daughter left the business. From then on the Defendant had only two 50% shareholders, namely the witness and Fouche Junior. When Junior passed on in January 2022, the witness became the only shareholder and member of the Defendant.

[19] Mrs. Fouche further testified that she was not involved in the transaction that now forms the subject-matter of this action. She knew Neels Hamman as a vehicle trader, but she did not know from where he was. Sometimes Neels Hamman would discuss motor transactions with Fouche Junior, but he was never employed by the Defendant. He could therefore not represent the Defendant. P.J. Hamman she did not know at all. She also knew nothing of a Land Rover that was traded in, nor does she know what had happened to this Land Rover.

[20] The witness also stated that the Defendant never issues invoices. The business uses a specific program which pertains to micro loans, and there are no invoices. The invoice that was issued to the Plaintiff for the payment of the purchase price for the Isuzu, which appears on page 1 of the trial bundle, is an old invoice that was used from time to time during about 2014. The amount of VAT indicated on the invoice, must be wrong, because the Defendant was not registered for VAT. The bank account number of the Defendant indicated on the invoice, is also not

the account of the Defendant. It was actually the personal account number of Fouche Junior. The e-mail address of the Defendant indicated on the invoice, is one that was normally used by Fouche Junior.

[21] The witness further testified that she could only trace one amount that was paid by the Plaintiff into the bank account of Fouche Junior as indicated on the invoice, and that was the amount of R109 614.00. Soon after this amount was paid in, Fouche Junior made a payment of R102 000.00 out of his account to one Sello, a person to whom Fouche Junior had made loans from time to time. Between Sello and the Defendant itself there was never any business, she testified. The Defendant never traded in motor vehicles, and in this respect, she referred the Court to pages 134 to 136 of the trial bundle, which contain the registration papers of the Defendant. The Standard Industrial Classification is indicated as "retail trade, except of motor".

[22] In cross-examination the witness confirmed that she was not present during the negotiations regarding the Isuzu. Therefore, she cannot dispute what mr. Britz had testified. She was also not present when the vehicle was delivered to the Plaintiff. When asked about the invoice of the Defendant that was issued to the Plaintiff, she said she could find no indication on her records that the invoice was ever e-mailed to the Plaintiff.

[23] The second and last witness for the Defendant was mr. Johan Mostert, the dealer sales manager of Standard Bank in Bloemfontein. He explained in his testimony that their customer, mr. Hamman, had traded the Isuzu in at Midcity Motors. He was thereafter contacted by Midcity when it was discovered that the Isuzu was a stolen vehicle. They wanted to know how Standard Bank could have financed a stolen vehicle. Litigation then followed between Midcity and the Plaintiff, which litigation became settled. The witness also referred to the invoice bearing the heading of Montana General Trading, which was referred to earlier herein. This invoice was issued, on the face of it, by the Defendant to the Plaintiff for payment of the purchase price for the vehicle. The witness also referred to a payment document on page 3 of the trial bundle, showing that Standard Bank has paid Montana General Trading (customer L. Fouche) an amount of R109 614.55 into the account that was identified by mrs. Fouche as the personal

bank account of her late husband. Page 4 of the trial bundle shows that mr. P.J. Hamman had traded in his Land Rover Discovery for the Isuzu. Pages 8, 9 and 10 create the impression that a S.C. Pinkoane had sold his Isuzu bakkie to mr. P. J. Hamman.

[24] In cross-examination the witness confirmed that he only became involved in the transaction at the point where Hamman purchased the Isuzu, and not prior to that. The Defendant's case was then closed.

[25] Evaluation:

The first question that has to be considered is whether it was in fact the Defendant who had sold the Isuzu to the Plaintiff. This question is complicated by the fact that those directly involved in the transaction, can either not be traced or they are late. This is save for mr. Britz, the representative of the Plaintiff when the deal was concluded. His testimony was that mr. Neels Hamman had told him that there was an Isuzu at the Defendant which his brother, mr. P.J. Hamman wants to buy. They have already agreed the price for the Isuzu with mr. Fouche of the Defendant, but the Defendant could not assist him with financing for the vehicle.

[26] This witness then spoke to Louis Fouche Senior on the phone, who forwarded documents to him, including an invoice of the Defendant. The invoice showed that the Plaintiff had purchased the vehicle from the Defendant. All these documents were forwarded to Standard Bank together with an application for finance. Mr. P.J. Hamman was indicated on the application as the purchaser, and the Plaintiff as the owner of the vehicle at the time. Mr. Britz testified that he was not aware of the existence of a Louis Fouche Junior at the time.

[27] The testimony of mr. Britz clearly shows that neither of the Hammans represented or even pretended to represent the Defendant in concluding the agreement of sale. At most, they were only the purchasers of the vehicle, and the purchase price was already agreed with Fouche of the Defendant. In the Amended Particulars of Claim, however, it is alleged that the Defendant was

represented by Neels Hamman, alternatively L.J. Fouche. The focus must therefore now fall on Fouche to establish whether he was representing the Defendant. Mr. Britz testified that he had spoken to Fouche Senior on the phone. The invoice issued by ostensibly the Defendant, clearly came from Fouche Junior, because it bears the e-mail address used by Junior as well as his personal bank account. This is according to the evidence of his wife, mrs. Annelie Fouche.

[28] The irony is that either Fouche Junior or Fouche Senior could have lawfully represented the Defendant at the time, because the two of them were then the only shareholders and members of the Defendant. Mr. Britz also testified that the Plaintiff was made to believe that the Defendant was the seller of the vehicle, on the basis of the invoice provided by the Defendant and on the basis of his telephonic conversation with mr. Louis Fouche Senior.

[29] In the premises, this Court has to find that the Plaintiff has proven on a balance of probabilities that it was the Defendant who had sold the vehicle to the Plaintiff, duly represented by mr. Louis Fouche Junior or then by mr. Louis Fouche Senior, for that matter. The fact that Fouche Junior had received the consideration for the vehicle in his own bank account, has nothing to do with the Plaintiff. It is a matter between Fouche Junior and the Defendant. It may well be that Fouche Senior was not aware of this fact, but we will never know for sure.

[30] At the same time, it is a given that sale agreements of this kind have an implied term, in terms of the common law, that the seller warrants to the purchaser that the purchaser would not be evicted, alternatively that no third party who had an unassailable claim or title in respect of the goods, would evict the Plaintiff. It therefore follows that in this case, the Defendant is liable towards the Plaintiff, since the vehicle was attached by the police as a stolen vehicle.

[31] The next and last question for consideration is for what amount the Defendant is liable toward the Plaintiff. In the Plaintiff's Particulars of Claim, it claims the repayment of the purchase price from the Defendant, namely the amount of R550 000.00. The evidence, however, shows that the only amount paid by the

Plaintiff to the Defendant was the amount of R109 614.00. In this respect mr. Britz testified that mr. P.J. Hamman had traded in a Land Rover vehicle when he purchased the Isuzu from the Plaintiff. According to mr. Britz, this Land Rover went to the Defendant. Mr. Hamman had still owed the amount of R407 165.00 to Wesbank in respect of the Land Rover, and the Plaintiff settled this amount with Wesbank when Standard Bank paid over the purchase price of the Isuzu to the Plaintiff. The R109 614.00 was the balance owing to the Defendant, he testified. It is therefore clear that the Plaintiff provided the Defendant with a Land Rover to the value of R407 165.00 as well as a cash payment of R109 614.00. The total hereof is the amount of R516 779.00. These figures appear from pages 3 and 4 of the trial bundle.

[32] The position is therefore that the Defendant is liable to repay to the Plaintiff the amount of R516 779.00. Mr. Parodi of the Plaintiff testified that the Plaintiff had to pay Midcity Motors the amount of R550 000.00, and that is the amount that the Plaintiff now claims from the Defendant. If this is so, the Plaintiff's claim is a claim for damages. In the summons, however, damages are not claimed, but only the purchase price that the Plaintiff had paid to the Defendant for the Isuzu vehicle.

[33] In the premises, the following order is made:

1. The Defendant to pay the Plaintiff the amount of R516 779.00.
2. The Defendant to pay the Plaintiff interest on the aforesaid amount at the prescribed rate of interest *a tempore morae*.
3. The Defendant to pay the costs of suit.

P. J. LOUBSER, J

For the Plaintiff:	Adv. R. van der Merwe
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For the Defendant:	Adv. A.S. Boonzaaier
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