Republic of South Africa

**IN THE HIGH COURT OF SOUTH AFRICA**
**(WESTERN CAPE DIVISION, CAPE TOWN)**

Case No: **6695/16**

In the matter between:

**REFIN FINANCIAL SERVICES (PTY) LTD** Plaintiff

and

**LUSH AUTO CC** First Defendant
**MARCOS RAMON ARELLANO** Second Defendant
**MARC MISDORP** Third Defendant

Hearing: 12, 15 February, 19, 20, 22 March 2019
Heads of Argument: 22 March, 29 March (Plaintiff) and 29 April 2019 (Defendants)
Judgment: 13 June 2019

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**JUDGMENT**

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De Waal AJ:

[1] In 2014, the Plaintiff in this matter was in the business of arranging financing as an intermediary for the purchase of movable assets, including motor vehicles. The First Defendant ("**Lush Auto**") was then in the business of buying and reselling motor vehicles, especially luxury vehicles, for profit.

[2] This matter relates to transactions regarding the financing of the sale of a Jaguar XF5.0 V8 (**"Jaguar XF**") by Lush Auto to a certain Mr Zahir Malani ("**Malani**") which transactions took place at the end of March and beginning of April 2014 in Cape Town.

[3] At the time of the transactions the Second Defendant ("**Arellano**") was the sole member of Lush Auto. The involvement of the Third Defendant ("**Misdorp**") with Lush Auto at the time and his role in respect of the transactions are in dispute.

[4] The Plaintiff was an intermediary between a financial institution such as a bank, which institution would ultimately provide the finance to the customer to purchase the vehicle, and a car dealership such as Lush Auto. The need for such an intermediary arises when the bank is not prepared to deal directly with a particular dealership and requires an intermediary to step in in order to safeguard its interests.

[5] What happens in this scenario is that the dealership would sell the vehicle in question to the intermediary, upon which the intermediary would sell the vehicle to the bank, which will in turn sell or lease vehicle in terms of an instalment agreement or lease agreement to the end customer. Payment for the vehicle would then flow in the opposite direction from the bank to the intermediary and end up with the dealership.

[6] This is what happened in the present instance. The bank was the Motor Finance Corporation, a division of Nedbank Ltd ("**MFC**")). Having paid the Plaintiff (and the Plaintiff having paid Lush Auto), MFC concluded an

instalment agreement with Malani. The purchase price flowed from MFC back to the Plaintiff and then to Lush Auto.

[7] During June 2014 Malani failed to pay the instalments owed to MFC and that MFC then seized the vehicle. Although not entirely clear from the evidence, it seems that Malani only ever paid one instalment under the agreement to MFC. His role in the saga dealt with in this judgment remained somewhat of a mystery but it is fortunately not necessary to deal with his involvement for purposes of deciding the matter.

[8] After the vehicle was seized, MFC discovered that in the documentation presented to it by the Plaintiff, the vehicle was described as a 2011 Jaguar XFR5.0 V8 S/C (**"Jaguar XFR**") whereas in fact the vehicle was a Jaguar XF, as described above. The Jaguar XF is a considerably cheaper kind of Jaguar vehicle than the Jaguar XFR. As a consequence of the misdescription of the vehicle, MFC cancelled the agreement between it and the Plaintiff, returned the vehicle to the Plaintiff and the latter was obliged to pay MFC the amount of R985 139.29.

[9] After MFC was refunded by the Plaintiff, the latter attempted to cancel its sale agreement with Lush Auto and to seek a refund from Lush Auto. Lush Auto refused to refund the Plaintiff. In an attempt to mitigate its loss, the Plaintiff then sold the Jaguar to a third party for the sum of R275 000.00.

[10] Against this background, the Plaintiff decided to sue the Defendants and claims that it suffered damages in the amount of R710 139.29, being the

difference between the amount paid to MFC pursuant to the latter's cancellation of the sale and the amount recovered from the sale of the Jaguar.

[11] The Plaintiff claims that the Defendants are liable to compensate it for this loss on the following grounds:

11.1. Arellano and Misdorp are liable by reason of the fraudulent misrepresentations made to the Plaintiff's representatives regarding the kind of vehicle sold and the fair value thereof;

11.2. Lush Auto is liable for breaches of warranties in agreements with the Plaintiff and vicarious wrongs committed by Arellano and/or Misdorp in the course and scope of their duties as employees of Lush Auto; and

11.3. Arellano as liable as surety and co-principal debtor for any amount owed by Lush Auto to the Plaintiff.

[12] According to the Plaintiff, the relationship between itself, Lush Auto and Arellano was governed by three contracts:

12.1. The first contract is a Master Sale and Representation Agreement ("**the Master Agreement**") which was, according to the Plaintiff, entered into between itself and Lush Auto on 9 January 2014 and which governed the business relationship in general; and

12.2. The second contract is a Tripartite Agreement ("**the Tripartite Agreement**") concluded between the Plaintiff, Lush Auto and Malani

on 1 April 2014 and which dealt specifically with the disputed Jaguar sale transaction; and

12.3. The third contract is a Personal Suretyship and Demand for Security Agreement ("**the Suretyship Agreement**"), which is Annexure "**C**" to the Master Agreement and which the Plaintiff contends was also concluded between itself and Arellano on 9 January 2014.

[13] The Master Agreement was intended to govern the business relationship between the Plaintiff and Lush Auto in general whereas the Tripartite Agreement relates to the sale of the specific vehicle in question, i.e. the Jaguar XF in the present instance.

[14] In its plea, Lush Auto and Arellano denied that it entered into any of above three agreements. As far as the Master and Suretyship Agreements are concerned, they pleaded that Arellano's signatures on the agreements were forged. As far as the Tripartite Agreement is concerned, Lush Auto claimed that the agreement was never signed and accordingly never came into being.

[15] However, during the course of the trial, the Defendants' position changed in respect of the Tripartite Agreement. At trial, the Defendants accepted that this agreement was signed by Arellano and that it was binding.

[16] It is clear what precipitated this change in stance:

16.1. The defence that the Tripartite Agreement is "*unsigned and accordingly never came into being in a written form*", was based on the wrong document. It related to the pro-forma tripartite agreement

which was Annexure "**A**" to the Master Agreement, dated 9 January 2014.

16.2. The Tripartite Agreement in respect of the Jaguar, dated 1 April 2014, *was in fact signed*.

16.3. The Defendants confused the unsigned pro-forma of the tripartite agreement annexed to the Master Agreement, dated 9 January 2014, with the signed Tripartite Agreement dated 1 April 2014 relating to the Jaguar vehicle.

[17] The Defendants however maintained throughout the trial that the Master and Suretyship Agreements were never signed by Arellano.

[18] Against this background, I now turn to analyse the evidence presented at trial in order to determine the following issues:

18.1. Is Lush Auto liable to the Plaintiff by virtue of breach of the (signed) Tripartite Agreement?

18.2. Was the Master Agreement signed on behalf of Lush Auto and is Lush Auto liable to the Plaintiff due to breach of this agreement?

18.3. Did Arellano sign the Suretyship Agreement and is he liable to the Plaintiff by virtue of that agreement?

18.4. Did Arellano make fraudulent misrepresentations to the Plaintiff and is he and Lush Auto liable to the Plaintiff on account thereof?

18.5. Did Misdorp make fraudulent misrepresentations to the Plaintiff and is he and Lush Auto liable to the Plaintiff on account thereof?

**Liability in terms of the Tripartite Agreement?**

[19] In the particulars of claims, the Plaintiff claimed that, in the process leading up to the conclusion of the Tripartite Agreement, the parties agreed that Lush Auto would sell to the Plaintiff a Jaguar XFR and that Lush Auto represented that the total purchase price of R915 000.00 was a fair resale value. In truth, the vehicle was of course a Jaguar XF, with a far lower resale value.

[20] The Plaintiff further alleged that the representation breached the obligation and warranties arising from the Tripartite Agreement in that:

20.1. The purchased goods did not conform to the terms, description and specifications set out in the invoice for those goods;

20.2. The purchase price far exceeded the price normally charged by the dealer for products which are the same or substantially the same as the vehicle sold in the ordinary course of business on the basis of a cash transaction; and

20.3. The employees of Lush Auto did not act carefully, honestly, in good faith and without negligence.

[21] Crucial to the misrepresentation argument is an invoice, dated 28 March 2014 ("**the invoice**"), made out by Lush Auto to the Plaintiff. Given its importance in the present matter, that invoice is reproduced in full below:[1]

[1] There was also a Lush Auto stamp on the invoice which could not be reproduced

# LUSH AUTO CC

**INVOICE**

206B Main Road, Sea Point, Cape Town, 8005

**Tel:** 021 829 0904 **Fax:** 086 566 3690 **Cell:** 082 855 1011

Email: lushauto@gmail.com

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**28 March 2014**

| | |
|---|---|
| **PURCHASER:** | Refin Financial Services (Pty) Ltd<br>Glen Forum Building,<br>Cnr Corobay & Garsfontein Roads,<br>Menlyn<br>Pretoria<br>**VAT NO:** 4710254915 |
| **VEHICLE:** | Jaguar XFR 5.0 V8 S/C |
| **EXTRAS:** | PDC, NAVIGATION, REVERSE CAMERA |
| **REGNO:** | CA870111 |
| **ENGINE NO:** | 10122114044508PN |
| **CHASSIS NO:** | SAJAC06F0BLS08342 |
| **MILEAGE:** | 78 000 KM |
| **COLOUR:** | BLACK |

| | |
|---|---|
| **Selling Price EX:** | **R 802 631,58** |
| **VAT:** | **R 112 368,42** |
| **TOTAL:** | **R 915 000,00** |

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**All units are sold in good faith, as seen, inspected and road tested, without guarantees or warranties whatsoever. Year models and speedometer mileage readings are not guaranteed or otherwise stated in writing. The Purchaser is aware of these conditions.**

**IMPORTANT**

**Ownership of the vehicle shall be reserved in favour of Lush Auto until such time as the purchase price has actually been paid in full.**

[22] The description of the vehicle is wrong. The vehicle was not a Jaguar XFR but a Jaguar XF.

[23] The first question is whether this representation breaches any provisions of the Tripartite Agreement, standing alone. If so, Lush Auto would be liable to the Plaintiff regardless of whether the Master Agreement was signed and regardless of whether there were any fraudulent misrepresentations.

[24] The relevant clauses of the Tripartite Agreement are as follows:

24.1. Clause 3 records that "*the dealer sells the vehicle to ReFin in accordance with the provisions of the Master Deal Sale Agreement and with effect from the Effective Date, whereafter ReFin will sell the vehicle to the credit provider in accordance with the provisions of the Master Credit Provider Sale Agreement".*[2]

24.2. Clause 1 defines that Master Dealer Sale Agreement to mean the Master Dealer Sale Agreement concluded between ReFin and the dealer, which regulates the sale of motor vehicles by the dealer to ReFin, including the sale of the vehicle referred to in the Tripartite Agreement.

24.3. Clause 1 defines the term "*vehicle*" to mean the vehicle sold or to be sold by the dealer to ReFin in terms [of the Tripartite Agreement] and described in clause 5 together with such additional items specified in the invoice by ReFin to the credit provider.

[2] The Master Credit Provider Sale Agreement is defined to mean the Master Sale and Representation Agreement concluded between ReFin and the relevant credit provider in terms whereof the vehicle is sold by ReFin to the said credit provider.

24.4. Clause 5 contains a warranty from the dealer to ReFin regarding the authority of those signing on behalf of the former and a number of warranties from the consumer to the dealer and to Refin.

24.5. Clause 6 provides that the dealer and the consumer indemnify ReFin against actual losses, liabilities, damages and costs which ReFin may suffer or incur as a result of or in connection with a breach of warranty by either of them.

[25] The Tripartite Agreement, standing alone, does not contain relevant warranties made by the dealer. Clause 5 merely sets out that the dealer warrants that the signatories to the agreement are duly authorised. That clause further contains warranties from the consumer, which are not relevant. No relevant dealer warranties are stipulated in the Tripartite Agreement.

[26] The reason for this is that the relevant warranties are contained in the Master Agreement and the Tripartite Agreement incorporates the Master Agreement between the Plaintiff and Lush Auto. Clause 3, quoted above, read with the definition of the Master Agreement, incorporated the Master Agreement "*concluded between ReFin and the dealer which regulates the sale of motor vehicles by the dealer to ReFin*" What happens if no Master Agreement was ever signed, as contended by the Defendants? When this issue was raised, Ms Christians, who appeared for the Plaintiff, readily conceded that the Tripartite Agreement can only incorporate the Master Agreement to the extent that the latter was in fact signed and accordingly "*concluded*" between the Plaintiff and the dealer. This means that the Plaintiff cannot rely on the express terms of the Tripartite Agreement, standing on its own.

[27] Insofar as reliance was placed by the Plaintiff on an established trade practice, alternatively custom, I do not believe that the practice or custom was sufficiently established through evidence at the trial. In the Plaintiff's heads of argument it is merely stated that one of the Plaintiff's witnesses established the trade practice in his "*uncontroverted evidence*". I was not referred to specific parts of the evidence, which established the trade practice contended for, despite the fact that the evidence by the relevant witness was transcribed.

[28] For these reasons I conclude that Plaintiff's claim against Lush Auto cannot be granted due to breach of the Tripartite Agreement standing alone

**Liability under the Master Agreement?**

[29] The Master Agreement has six components:

29.1. A cover page containing the details of Lush Auto and the Plaintiff and defining them for purposes of the agreement as "*the dealer*" and "*the intermediary purchaser*";

29.2. A Credit Application for a Business Account, consisting of two pages in which the dealer is required to provide details of its business and bank account; its business / trade references as well its consent to use the information provided and that held by credit bureaus to assess the creditworthiness of the dealer;

29.3. The detailed terms and conditions which run from page 3 to 16;

29.4. Annexure **"A"** to the Master Agreement is a pro-forma tripartite agreement;

29.5. Annexure **"B"** to the Master Agreement is the rules of engagement between the intermediary purchaser (i.e. the Plaintiff) and the dealer; and

29.6. Annexure **"C"** to the Master Agreement is the personal suretyship.

[30] The case for Lush Auto is that Arellano was prepared to sign the credit application in order to get onto the Plaintiff's "*panel*" but that he was not prepared to sign the other parts of the Master Agreement. In this regard, Arellano:

30.1. Claimed that did not sign because he wanted to discuss the terms of the Master Agreement with his father and his attorney.

30.2. Claimed that he kept an unsigned copy of the remainder of the Master Agreement with him and these parts were never signed. By the time of the trial, some five years later, he no longer had a copy of the unsigned agreement as Lush Auto had closed down some time ago.

30.3. Claimed that someone must have forged his signature on the last two pages of the Master Agreement and his initials which appear on the other pages.

30.4. Repeatedly challenged the Plaintiff to provide the opinion of a handwriting expert on whether the signatures and initials on the remainder of the Master Agreement are his.

[31] The Plaintiff's version was provided mainly through the evidence of Mr Jaco du Toit ("**Du Toit**"), the Plaintiff's Managing Director during the relevant period (January to April 2014).

[32] According to Du Toit, he and Ms Trish Owens ("**Owens**"), the Plaintiff's Business Development, Finance and Insurance Manager at the time, visited the premises used by Lush Auto on 9 January 2014 with the express purpose to sign Lush Auto up as a dealer. According to Du Toit, this included the signing of the Master Agreement. Du Toit testified that the Plaintiff would never do business with any dealership without such an agreement in place.

[33] Owens testified that she had most of her dealings with Misdorp. Owens and Du Toit indeed considered Misdorp to be the driving force behind Lush Auto. Why was Misdorp not asked to sign the Master Agreement? According to Du Toit, Misdorp said to him on 9 January 2014 that he could not or was reluctant to sign documents as he was going through a divorce.

[34] For this reason, Du Toit testified, Arellano was asked sign the documents on behalf of Lush Auto. Du Toit further testified that he personally saw Arellano signing the "*pack of documents*" which included the Master Agreement.

[35] I pause at this stage to explain that the business premises of Lush Auto was not what one would normally associate with a car dealership. The premises had no showroom and it was in fact the premises from which Misdorp ran his

other business (Supplements Express) which sold food supplements to bodybuilders and others interested in such products.

[36] According to Du Toit, the signing was done by Arellano at the front desk of the shop. Owens, who signed the Master Agreement on behalf of the Plaintiff and, it appears, also signed as witness, was at that stage at the back of the shop busy with another transaction. Owens did not actually see Arellano signing the agreement. Misdorp, on the other hand, claimed that he was outside the shop.

[37] None of the Plaintiff's witnesses was asked to explain why a handwriting expert was not called. Plaintiff's counsel, however, suggested that it is not the kind of matter where a handwriting expert would be able to give a conclusive opinion.

[38] The approach to be adopted in resolving factual disputes in a trial when there are two irreconcilable versions is set out in **Stellenbosch Farmers' Winery Group Ltd v Martell *et Cie*** 2003 (1) SA 11 (SCA) (my underlining):

> "[5] On the central issue, as to what the parties actually decided, there are two irreconcilable versions. So, too, on a number of peripheral areas of dispute which may have a bearing on the probabilities. The technique generally employed by courts in resolving factual disputes of this nature may conveniently be summarised as follows. To come to a conclusion on the disputed issues a court must make findings on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities. As to (a), the court's finding on the credibility of a particular witness will depend on its impression about the veracity of the witness. That in turn will depend on a variety of subsidiary factors, not necessarily in order of importance, such as (i) the witness' candour

and demeanour in the witness-box, (ii) his bias, latent and blatant, (iii) internal contradictions in his evidence, (iv) external contradictions with what was pleaded or put on his behalf, or with established fact or with his own extracurial statements or actions, (v) the probability or improbability of particular aspects of his version, (vi) the calibre and cogency of his performance compared to that of other witnesses testifying about the same incident or events. As to (b), a witness' reliability will depend, apart from the factors mentioned under (a)(ii), (iv) and (v) above, on (i) the opportunities he had to experience or observe the event in question and (ii) the quality, integrity and independence of his recall thereof. As to (c), this necessitates an analysis and evaluation of the probability or improbability of each party's version on each of the disputed issues. In the light of its assessment of (a), (b) and (c) the court will then, as a final step, determine whether the party burdened with the onus of proof has succeeded in discharging it. The hard case, which will doubtless be the rare one, occurs when a court's credibility findings compel it in one direction and its evaluation of the general probabilities in another. The more convincing the former, the less convincing will be the latter. But when all factors are equipoised probabilities prevail."

[39] In applying these principles, the Plaintiff has shown, in my view, on the balance of probabilities, that Arellano in fact did sign the Master Agreement. I base this finding on the following reasons:

39.1. Firstly, there are the probabilities.

39.2. Du Toit visited the Lush Auto premises for no other reason than to sign it up as a dealer. The Plaintiff never dealt with Lush Auto before that day, i.e. 9 January 2014. Lots of deals apparently took place thereafter between the two entities. It is inconceivable that the

Plaintiff would have done all these deals with Lush Auto if Arellano held back the Master Agreement in order to first discuss the contents with his father / attorney. It is also inconceivable that if Arellano asked for time to consider the Master Agreement that there would be no email or other document in which the issue is raised. Surely Du Toit or Owens would have asked him how much time he needed, etc.?

39.3. There was a reason why Du Toit did not sign there and then for the Plaintiff. The purpose of his visit was to get Lush Auto to sign to Master Agreement. Thereafter the Plaintiff would do certain checks before entering into the Master Agreement. This explains why Owens signed later on behalf of the Plaintiff and (probably) why she also signed as a witness to Arellano's signature.

39.4. The Defendants sought to make something out of the fact that the Addendum to the Master Sale & Presentation Agreement purports to reflect the signature of Arellano as having signed on behalf of <u>both</u> Lush Auto and the Plaintiff. I do not believe that anything can be made of this. The obvious explanation is that he signed twice by mistake. It is certainly not a fact which shows that Arellano's signature was forged. Someone forging Arellano's signature on the Master Agreement at the instigation of the Plaintiff would avoid doing so twice. Why forge Arellano's signature purporting to sign for the Plaintiff when Owens or someone else could simply have signed this part? In fact, Owens did sign this part and she appended her signature next to the one of Arellano – on the correct place for Refin. In my view, Arellano signing twice was not a mistake that someone

forging his signature would have made, particularly not someone who then puts her own signature next to the one of Arellano.

39.5. Secondly, there is the direct evidence at the trial.

39.6. Du Toit made a good impression on me as a witness. For instance, he readily conceded that he could not be 100% sure about whether there were deals between the Plaintiff and Lush Auto before 9 January 2014 and then undertook to conduct a search for documentation relating to such deals.[3] It was later reported through his attorneys that no such documentation exist. The rest of his evidence was also consistent and believable.

39.7. Arellano's evidence, on the other hand, was not convincing at all. As I shall explain below, he had to change his version on the witness stand in respect of a number of important issues. For present purposes, he could not explain why it was contended in the answering affidavit in the summary judgment proceedings / plea that the Tripartite Agreement was "*unsigned*". He could also not explain his reference to "*two oral contracts of sale between the Plaintiff and Lush*

[3] In cross-examination, Mr Stevens, who acted for the Defendants, suggested to Du Toit that there may have been business between the Plaintiff and Lush Auto before 9 January 2014, when the Master Agreement was allegedly signed. Pursuant to a request from Mr Stevens, I then ruled that any documentation to this effect should be discovered as it was clearly relevant, even though discovery was only sought during the trial. It turned out that there are no documents in the possession of the Plaintiff which indicates that there were business dealings between itself and Lush Auto before 9 January 2014. Lush Auto also produced no such documents.

Mr Stevens also made application or demanded that the Plaintiff should discover its financial statements to enable the Defendants to determine whether an application for security for costs is warranted. This request was denied. The effect of the omission in the 2008 Companies Act of a provision similar to that of the repealed Companies Act allowing a court to order a plaintiff company to furnish security for costs is that Court may only order a plaintiff *incola* company to furnish security if satisfied that the proceedings are vexatious, reckless or otherwise amounting to abuse. See, **Boost Sports Africa (Pty) Ltd v SA Breweries (Pty) Ltd** 2015 (5) SA 38 (SCA). No such case was made out in the present instance.

*Auto*" in his answering affidavit. The inference to be drawn is that the Defendants' initial strategy was to deny that *any* written contracts came into being between Lush Auto and the Plaintiff. For this reason it was claimed that the Tripartite Agreement was unsigned, and that Arellano's signature was forged on the Master Agreement / Suretyship Agreement. But this strategy unravelled when it emerged that the relevant Tripartite Agreement was concluded on 1 April 2014. This change in stance casts grave doubts on the credibility of Arellano.

39.8. The signatures and initialling on the Tripartite Agreement, which Arellano admitted are his, do not in my view differ materially from the signatures and initialling which appear on the Master Agreement and Suretyship Agreement. Although no handwriting expert was called by either party, any person observing these signatures / initials would conclude that they are not an obvious forgery. I do attach, some, but not significant weight to this observation of my own.[4]

[40] For these reasons, I find that the Plaintiff has shown, on the balance of probabilities, that the Master Agreement was signed.

[41] I now turn to the terms of the Master Agreement. For present purposes, the following terms are of importance:

[4] In the Defendants' heads of argument reference is made to the work **Law of Evidence** by Schmidt and Rademeyer at p. 10-6 where the learned authors state that s 4 of the Civil Proceedings Evidence Act 1965 "*makes it possible for the court or a layperson to make the comparison, but the courts are hesitant to rely on their own judgment or that of a layperson instead of that of an expert*".

41.1. Clause 3.3.1, which provides that the dealer will issue an invoice to the intermediary purchase in respect of the goods concerned reflecting a full and accurate description of all goods sold;

41.2. Clause 3.5, which provides that the purchase price will not exceed the price normally charged by the dealer, for products which are the same or are substantially the same as the goods, in the ordinary course of business on the basis of a cash (CSI) transaction;

41.3. Clause 6.1.3, in terms of which the dealer warrants in favour of the intermediary purchaser that upon delivery of the goods they will confirm to the terms, description and specifications set out in the relevant invoice;

41.4. Clause 6.1.13. which provides that the dealer recognises that the intermediary purchaser never had effective control over the goods and that it is unreasonable to expect the intermediary purchaser (and the bank) to have discovered any defect to the goods;

41.5. Clause 7.1, which provides that the dealer indemnifies the intermediary purchaser against, *inter alia*, losses which the latter may suffer or incur as a result of or in connection with a breach of warranty by the dealer or the negligent or wilful breach by any person employed or appointed by the dealer.

[42] By presenting to the Plaintiff on invoice that it was buying a Jaguar XFR whereas in fact it was buying a Jaguar XF, Lush Auto breached all of the above terms.

[43] Moreover, to the extent that Lush Auto acted in breach of the Master Agreement, it cannot escape liability based on the alleged instruction received from Owens, which I deal with below, to invoice for a Jaguar XFR and not for a Jaguar XF. Clause 20.1 of the Master Agreement is clear in that the parties are not bound by any representations not recorded in writing. Variations of the Master Agreement must also be recorded in writing as is the case with the Tripartite Agreement (see clause 10 of the latter).

[44] Lush Auto is thus liable to pay the Plaintiff's damages for breach of the Master Agreement.

**Arellano's liability based on the Suretyship Agreement**

[45] The dispute about the signing of the Suretyship Agreement is the same as the one about the signing of the Master Agreement. Arellano denies that he signed the Suretyship Agreement whilst Du Toit claims that it formed part of the pack of documents signed by Arellano in his presence on 9 January 2014.

[46] Arellano did not proffer any reason why he would have signed the Master Agreement but not the Suretyship Agreement. Of course, his version is that he neither.

[47] In my view, for the reasons set out above, both were signed.

[48] In terms of the Suretyship Agreement (Annexure "**C**" to the Master Agreement), Arellano bound himself as suretyship and co-principal debtor for the due and punctual performance by Lush Auto of all its obligations to the Plaintiff, including for damages for breach of contract.

[49] In the circumstances, Arellano is personally liable for the damages due to the breach of contract by Lush Auto.

**Liability due to misrepresentations made by Arellano**

[50] I have concluded above that Lush Auto and Arellano are liable for the Plaintiff's damages due to breach of contract. For the event that I may be wrong on that score I proceed to consider whether they are also liable to the Plaintiff based on alleged fraudulent misrepresentations made by Arellano in the course and scope of his duties as employee of Lush Auto.

[51] Two preliminary issues arise in respect of this alternative ground for the relief sought against Arellano (and Misdorp).

[52] The first is the Defendants' contention that no separate delictual claim is contained in the Plaintiff's particulars of claim and that allegations regarding the delictual claim are "*intermingled*" with those regarding the contractual claim. I disagree. Specific allegations regarding the fraudulent misrepresentations made by Arellano and Misdorp are made at paragraph 23 of the particulars. It is then stated at paragraph 26 that, but for these representations, the Plaintiff would not have concluded the agreements relating to the Jaguar and would not have transferred the sum of R920 684.04 to the Plaintiff. Moreover, in paragraph 31, the claims made against Arellano and Misdorp, based on fraudulent misrepresentation, are listed separately from those against Lush Auto, based on breaches of the Master and Tripartite agreements. There can accordingly be no doubt that the delictual claim was pleaded separately to the contractual claim.

[53] The second point taken in the Defendants' heads of argument is the Plaintiff's particulars fall foul of the *ratio* expounded in **Lillicrap, Wassenaar and Partners v Pilkington Brothers (SA) (Pty) Ltd** 1985 (1) SA 475 (A). This objection also has no merit. As held in **Holtzhausen v Absa Bank Ltd** 2008 (5) SA 630 (SCA), an action is maintainable in delict even if a concurrent action is available in contract as long as the negligence alleged does not consist of breach of contract.

[54] I now turn to deal with the evidence regarding the claim made against Arellano based on fraudulent misrepresentation.

[55] This part of the dispute turns on the reason why the invoice describes the vehicle to be purchased by the Plaintiff from Lush Auto as a Jaguar XFR and not a Jaguar XF. It is common cause that the difference is material in that the Jaguar XFR's value can be as much as R150 000.00 higher than the Jaguar XF.

[56] The Plaintiff's version is essentially that Owens dealt with Misdorp regarding the financing of the Jaguar sale to Malani. The representation made on the invoice was the *merx* was a Jaguar XFR and that a selling price of R915 000.00 would be a fair price for this vehicle.

[57] The Defendants' version, on the other hand, was that Arellano was dealing with Owens, who instructed him what amount to invoice for.

[58] As with the signing of the Tripartite Agreement, Arellano's version of why the description of the vehicle on the invoice is wrong, changed. His version changed from the answering affidavit in the summary judgment application

(dated 23 June 2016) to the plea (dated 5 August 2016) and then yet again at the trial which took place in February / March 2019. More particularly:

58.1. In the answering affidavit in the summary judgment proceedings, Arellano claimed that it is difficult to "*distinguish*" as the XF and XFR look identical and that he was genuinely under the impression and had good reason to believe that the vehicle could be sold at the reasonable price of R915 000.00. Arellano further claimed that Owens advised him to insert the code listed under "*special vehicles*" in the Mead & McGrouther Trade Book ("**the M&M Book**") which matched the price of the vehicle, being a Jaguar XF series in 2011 as there was no code listed for the Jaguar XFR. He further contended that an email was sent by Owens directing Lush Auto to submit the invoice setting out the agreed price and model details of the vehicle.

58.2. In their plea, the Defendants make no mention that the XF and XFR Jaguars look identical but claimed that they at all times "*genuinely believed*" that the vehicle which was invoiced to the Plaintiff was in fact what it purported to be. The claim regarding what Owens advised Arellano to do is repeated as per the summary judgment affidavit.

58.3. During the trial, Arellano changed his version again. At trial he contended that:

53.3.1 He knew at all times that the vehicle to be sold was a Jaguar XF and not a Jaguar XFR;

53.3.2 He could not find the M&M code for a Jaguar XF and took the matter up with Owens, who instructed him to use the code for the cheapest XFR model and series;

53.3.3 Owens instructed him to invoice in the amount of R915 000.00; and

53.3.4 He sent the invoice by email on 28 March 2019 to Owens ("**the 28 March email**");

53.3.5 The 28 March email had two attachments, namely the invoice, which attachment was named "*Jaguar XF Premium Lux*" and the Natis document of the vehicle which reflects the vehicle as a Jaguar XF series;

53.3.6 The above indicates that there was no intention to misrepresent the vehicle.

[59] The evidence presented on behalf of the Plaintiff was essentially that Owens got the information regarding the vehicle from Misdorp. Given that it was described as a Jaguar XFR, the Plaintiff and MFC was satisfied about the selling price of R915 000.00.

[60] The Plaintiff also called Mr Edward le Roux ("**Le Roux**"), who has worked for MFC for 25 years. Le Roux testified that the bank tests the value of a vehicle by selecting the make, model, series and derivative from a dropdown menu on the M&M Book. They do not enter the M&M code but work with the specifications of the vehicle given to them. This means that it is irrelevant

whether or not the M&M code is provided. The bank needs the vehicle's details, not a code.

[61] Le Roux also testifies that the Natis system hardly ever correctly reflects the specific derivative of a vehicle. The evidence of Le Roux on this last aspect was confirmed by Mr Anton Brewer ("**Brewer**"), who was employed by Jaguar from 2006 – 2011.

[62] At the end of the trial the Plaintiff applied for the introduction into evidence of correspondence between the parties' attorneys to the effect that there was a third attachment to the 28 March email, namely an extract from the M&M code which underlined the XFR 5.0 V8S/C series / derivative with a new vehicle price of R1 187 000.00. The Defendants did not object to the introduction of this evidence but requested an opportunity file an answering affidavit which, it was suggested, would place the correspondence into context as to its meaning. In that answering affidavit, the Defendant's attorney however alleges that he made a *bona fide* error regarding the question of whether the extract from the M&M Book was annexed to the 28 March email. According to him, it was not attached to that email.

[63] In the view I take of the matter it is not necessary to determine whether the extract from the M&M Book was annexed to the 28 March email.

[64] I now turn to analyse the evidence:

64.1. The email correspondence of 28 March 2014 constitutes the most important evidence regarding the factual dispute now under consideration.

64.2. On that day at 12:30 PM, Owens sent an email to Misdorp's email address at Lush Auto in which she states that the latter must invoice for R915 000.00. A response is then sent from Misdorp's email address at 2:11 PM to which there were at least two attachments, namely the invoice and the Natis document.

64.3. The Defendants' version kept changing. In the summary judgment answering affidavit and plea it is suggested that they did not know that the vehicle was an XF and not an XFR. It was further contended that Owens instructed Arellano to use the M&M code for the XF. All of this changed during the trial when it was contended that Owens instructed Arellano to use the cheapest XFR code.

64.4. But even the Defendants' last version makes no sense. The absence of the M&M code for the XF was no reason to misrepresent the series / derivative on the invoice. The invoice does not reflect any M&M code. The claim that the wrong vehicle description had to be put on the invoice because there was no code that matched the Jaguar XF 5.0, is accordingly illogical.

64.5. It must be borne in mind, as was conceded by Arellano, that the invoice was for the Plaintiff's benefit only as no one else would see it.

64.6. Brewer testified that if the M&M code is not available, the appropriate response would be to obtain a so-called "*Transunion report*" for the vehicle. This tool was available to the Plaintiff. Owens would have resorted to this fall-back instead of instructing Arellano to submit the

wrong description. It was never suggested that Owens was somehow in cahoots with Lush Auto to defraud the bank.

64.7. It is inconceivable, if the unusual instruction came from Owens to invoice for a different, more expensive, series / derivative, that this would not have been recorded in either her email or in the response thereto from Misdorp's email address. Merely naming the attachment "*Jaguar XF Premium Lux*" does not deal with the alleged unusual instruction from Owens. Also, the fact that the Natis document reflected the vehicle as a Jaguar XF was not of much assistance as Brewer convincingly explained that the series and derivative were often not correctly reflected on the Natis document. Owens accordingly would only check whether the invoice corresponds with the year, chassis number and engine number on the Natis document.

64.8. To this one must add that the invoice also contains other material misrepresentations. As far as "*extras*" is concerned, the invoice listed: "*PDC, NAVIGATION, REVERSE CAMERA*" whereas Arellano accepted during cross-examination that these features actually come out standard with the Jaguar XF. Arellano's explanation that the features are described so as to inform the client what he or she "*is getting*", merely has to be stated to be rejected. One simply does not misrepresent a feature as an extra in order to inform the client what he or she is buying. In the present instance it makes even less sense as this representation was made to the Plaintiff and not the ultimate customer, i.e. Malani.

64.9. Then there is the fact that Lush Auto bought the Jaguar from Fantasy Cars for a mere R320 000.00. The vehicle was sold days later to Malani for almost triple the price. Who gained by misrepresenting the kind of vehicle to be sold? It is in my view unlikely in the extreme that Owens, knowing that the vehicle is a Jaguar XF and not a Jaguar XFR, would have "*dictated*" the much higher price to Lush Auto. All that the Plaintiff stood to gain from any higher price was a slightly higher commission (R50 000.00). Lush Auto, on the other hand, stood to gain more than R600 000.00 from misrepresenting the vehicle as an XFR.

64.10. Finally, there is the question of how the "*R*" badge got on to the Jaguar vehicle. It was not there when the Jaguar was bought from Fantasy Cars and yet it was there when the vehicle was seized from Malani. The Plaintiff had no opportunity to add the badge. It didn't possess the vehicle before it was sold and only saw it after repossession. On the probabilities, it seems more likely than not that the Defendants were responsible for adding the "*R*" badge.

[65] For these reasons, I reject the evidence of Arellano and accept the Plaintiff's version which is that a misrepresentation was made, knowing that it was false, to the effect that the vehicle to be sold to Malani was a Jaguar XFR and not a Jaguar XF.

[66] This means that Arellano is also liable in delict to pay the Plaintiff's damages. Lush Auto is also liable on this basis as Arellano was acting within the course and scope of his duties as employee when he made the misrepresentation.

**Misdorp's involvement and liability**

[67] As already explained above, the Plaintiff's version is that Owens dealt throughout with Misdorp regarding the sale of the Jaguar vehicle.

[68] The Defendants, on the other hand, contended that Misdorp had no involvement as far as the misrepresentation is concerned.

[69] This calls for an analysis of the evidence as far as Misdorp's involvement is concerned.

[70] Yet again, the Defendants' version changed.

[71] To begin with, in the answering affidavit in the summary judgment proceedings Lush Auto claimed that Misdorp had at no point in time been a member of Lush Auto. This is wrong. From the CIPC company search, which was admitted into evidence, it is apparent that:

71.1. Misdorp was appointed as a member on 30 May 2012 and he resigned on 2 November 2012.

71.2. Thereafter, he was again appointed on 16 October 2015 and resigned on 3 February 2016.

71.3. Arellano on the other hand was appointed on 10 August 2012 and resigned on 10 December 2014.

71.4. Thereafter, Arellano was again appointed on 19 December 2014 and resigned on 16 October 2015.

[72] It is not clear why Misdorp swapped with Arellano over these periods. Misdorp testified that he sold the car dealing business to Arellano and then later bought it back. No details were given about the amounts that were paid. Misdorp claimed that over the years that he was doing deals with Owens, whilst the latter was representing other companies, amounting to some R40 million a year. It would have been somewhat of a strange move to sell a business with this kind of turnover for no good reason. More likely, in my view, is that during the time when Misdorp was going through his divorce, it suited him not to be a member of Lush Auto as he did not want this asset in his name. However, Misdorp continued to be very much involved although he was no longer formally a member.

[73] Misdorp's involvement, even during the time when he was replaced by Arellano as the sole member of Lush Auto, is evidenced by the following facts which were established at the trial:

73.1. Facebook page of Lush Auto which existed throughout the relevant period, i.e. January 2014 – April 2014. During that time various vehicles were advertised and members of the public were invited to contact Misdorp at his cell number. Misdorp also corresponded with members of the public on the Facebook page. Not a single advertisement directs the public to contact the supposed owner, Arellano.

73.2. Arellano never had his own email address at Lush Auto. Instead, it was claimed that he always used Misdorp's email address, i.e. marc@lushauto.co.za. The reason for this, Misdorp claimed, is that

the public was used to his email address and hence Arellano decided to continue using it. I find this explanation entirely unconvincing. A new owner would hardly keep on using the email address of the previous owner. Emails directed at the former owner's email could be easily redirected to the new owner's email address.

73.3. The crucial email, dated 28 March 2018, is identified in a discovery affidavit, deposed to by Misdorp, as an email to the Third Defendant, i.e. Misdorp.

73.4. Misdorp's cell number appears on the invoice for the Jaguar that the present matter relates to. On this invoice, the email address given is lushauto@gmail.com, which indicates that Misdorp's email address was not the only one used. This in turn raises the question of why Arellano did not use this email but instead used Misdorp's email when doing the Jaguar transaction.

73.5. In the credit application to the Plaintiff, Misdorp's name was given as a director. The reason for this, Arellano claimed, is because Misdorp was known to the Plaintiff and his name would have facilitated the approval of the credit application. Again, I do not find this convincing. I fail to see how the inclusion of Misdorp as a director would have assisted Lush Auto in respect of the credit application. It would not add anything. In my view, it was placed there because Misdorp continued to act *de facto* as a "*director*" of Lush Auto.

73.6. "*Marc*" is listed as the contact person for Lush Auto on the Tripartite Agreement, notwithstanding Arellano's signature on the document.

73.7. Despite being in Court throughout the proceedings, Arellano did not dispute Du Toit's evidence that Arellano told him to speak to Misdorp regarding MFC's complaints (and accordingly the present dispute). Why would Misdorp deal with the fall-out in circumstances where he had nothing to do with the transaction in question?

[74] Turning to the Jaguar deal in particular, Arellano initially testified that he was solely responsible for this transaction. Crucially, he claimed that the deal came about because Malani contacted him from KwaZulu-Natal to find a Jaguar luxury vehicle for him. According to Arellano he then went to source the vehicle. His evidence in chief was that he did not buy the vehicle until Malani's finance was approved. It however quickly became apparent during cross-examination by Ms Christians, that this could not possibly have been the case as Lush Auto had already purchased the Jaguar from Fantasy Cars on 20 March 2014, some six days before the first credit application on behalf of Malani was forwarded to the Plaintiff.

[75] Arellano then had to change his version on this aspect as well. He then testified that Misdorp must have purchased the vehicle but that he was unfamiliar with the details. He could not, for instance, explain why the Jaguar's price was so low and it was a "*distressed sale*" made by Fantasy Cars to Lush Auto. Arellano then claimed that Misdorp, as the "*salesperson*" was authorised to sign sale agreements or purchase agreements (in the case of the deal with Fantasy Cars) on behalf of Lush Auto. One of these sale

agreements, relating to a Mercedes-Benz E350 was introduced into evidence and Misdorp admitted that he signed this sale agreement and that he was authorised to do so on behalf of Lush Auto.

[76] In my view, one is driven to the conclusion that Arellano did not know much about the Jaguar deal and that Misdorp remained the driving force in respect of this transaction as well.

[77] Misdorp himself claimed that he bought the vehicle as a great bargain from Fantasy Cars as the latter was going through financial difficulties. This was done even though Lush Auto would not ordinarily buy vehicles to keep as dealer stock. Ordinarily, Lush Auto would merely link buyers with sellers. Lush Auto, after all, had no showroom. Misdorp further testified that by pure coincidence, very shortly after the Jaguar XF was bought, Malani made enquiries for such a vehicle. According to Misdorp, Arellano handled the rest of the transaction and all that he received was a 10% commission for sourcing the vehicle.

[78] In my view, Owen's evidence to the effect that Misdorp was involved in the transaction, or that he was at least co-responsible for the misrepresentation on the invoice, is to be preferred over the evidence of Arellano and Misdorp. In this regard, I find the following to be of some importance:

78.1. Arellano had to change his version drastically during cross-examination as to how the transaction came about. It became apparent that the person with the knowledge of the deal was Misdorp. It is inconceivable that he did not carry it through.

78.2. Misdorp's email was used for the Jaguar transaction. I do not find the explanation that Arellano used Misdorp's email convincing.

78.3. Misdorp's cell number is on the Jaguar invoice.

78.4. The continuing involvement of Misdorp is demonstrated by the Facebook page, his email address being used, and his name on the credit application as director.

78.5. Owens' evidence was acceptable.

[79] I accordingly conclude that Misdorp must have been at least co-responsible for the misrepresentation on the invoice and that he too is liable for the Plaintiff's damages due to this fraudulent misrepresentation.

[80] Misdorp furthermore held out to the world that he could represent Lush Auto in these deals, as is evidenced from his cell number on the invoice; the Facebook page; his email address being used; and his name on the credit application as director. In the circumstances, I further hold that Lush Auto is estopped from denying Misdorp's authority to represent it and that Lush Auto is vicariously liable for Misdorp's misrepresentations.

**Quantum**

[81] As to the quantum of damages, Du Toit testified that R275 000.00 was the best that the Plaintiff could secure for the vehicle. This was not seriously disputed, no doubt because it was common cause that the same vehicle was bought by Lush Auto from Fantasy Cars for R320 000.00 in March 2014. It

was further not disputed that the Plaintiff had to pay MFC the amount of R985 139.29 and that the Plaintiff accordingly suffered damages in the amount of R710 139.29,

**Conclusion**

The following order is made:

(a) First, Second and Third Defendants are ordered liable, jointly and severally, the one paying the others to be absolved *pro tanto*, to pay the Plaintiff the sum of R710 139.29 plus interest on that amount from the date of the summons (21 April 2016) to the date of final payment;

(b) First, Second and Third Defendants are further to pay the Plaintiff's costs in the matter.

**H J DE WAAL AJ**
**Acting Judge of the High Court**
Cape Town
13 June 2019

**APPEARANCES**

**Plaintiff's counsel: Ms A Christians**
**Plaintiff's attorneys: Smiedt & Associates**

**Defendants' counsel: Mr D Stevens**
**Defendants' attorneys: AZS Attorneys Inc.**