IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

11/8/15

Case Number: 74042/2014

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: ~~YES~~/NO

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

(3) REVISED. ✓

11/08/15
DATE

SIGNATURE

In the matter between:

TANDO SONQISHE APPLICANT

And

WILLY BLACK MOTORS (PTY) LTD
T/A DELMAS NISSAN RESPONDENT

JUDGMENT

Fabricius J,

1.

In this opposed application the Applicant seeks repayment of R 1.1 million plus interest plus costs from the Respondent, which amount was paid to the latter as a partial deposit for a motor vehicle. This deposit was paid in four tranches and after a considerable period, when the motor vehicle had not been delivered to him, he cancelled the agreement and demanded return of the money paid. The essence of Respondent's defence is that no moneys were received from the Applicant, and I will elaborate on this defence hereunder.

2.

It was submitted by Applicant's Counsel that the following facts were undisputed:

2.1

Applicant provided the Respondent (at its request) with bank guaranteed cheques totalling the amount claimed. In this context it was Respondent's version that the person to whom the cheques were handed, its salesperson in this transaction. Ms Morereane handed the cheques back to Applicant. No confirmatory affidavit was filed by this salesperson and Applicant's Counsel accordingly submitted that this version constituted inadmissible hearsay evidence. I agree;

2.2

Respondent's employees (the said Ms Morereane, and a Mr Adendorf) accepted the said bank guaranteed cheques and at all relevant times acted within the course and scape of their employment with the Respondent. I may just add at this stage that Respondent's Counsel was of the view that Ms Morereane had committed a fraud on them and upon Applicant, and this could not have been within the scope of her employment.

See however: ***K vs Minister of Safety and Security 2005 (6) SA 404 CC.*** In any event however, when Ms Morereane accepted the particular cheques, she clearly acted as salesperson of Respondent.

2.3

All the bank guaranteed cheques were paid into the bank account of the Respondent and, conversely, debited against the Applicant's bank account;

2.4

The contract with the Respondent was cancelled.

3.

Issues to be decided:

Applicant's Counsel said that I had to decide the following issues, and could do so on the papers and there was no necessity to refer the matter for the hearing of oral evidence.

3.1

Did Applicant make payment of the amount claimed to the Respondent? In this context the Applicant's evidence that he handed the various cheques to Respondent's employees (Ms Morereane and Mr Adendorf) was undisputed. Respondent's version in this particular context was that it was paid into the bank account under the name of a certain Mr Mahlangu who apparently connived with the said Ms Morereane. In his answering affidavit it said Mr Mahlangu deposited the cheques into the Respondent's bank account under the pretence that he was the interested person in acquiring certain access from Respondent. Respondent's version in this regard, namely that Ms Morereane handed the cheques back to the Applicant and a certain Mr Mahlangu thereafter convinced Applicant to hand the cheques over to him and that he would handle the deposit on Applicant's behalf was not supported by confirmatory affidavits and constitutes hearsay evidence. The Applicant's evidence that he handed the particular cheques to Respondent's employees is in my view undisputed. Even if the allegation that the cheques were handed back to Applicant was allowed to stand in the absence of any confirmatory affidavit, it is so highly improbable that it stands to be rejected outright. Why would the Applicant transact with a Mr Mahlangu, who was not employed by Respondent and hand him cheques made payable to the Respondent? I agree that this is so unlikely I cannot find that it did occur in the absence of confirmation at least.

Is Respondent liable in contract?:

Applicant's Counsel said that his claim against Respondent was founded on contract. It was concluded between Applicant and Respondent's salespersons, a number of cheques were handed over to those salespersons and as a result Respondent was obliged to perform by handing over within a reasonable period, the particular vehicle. This was not done and it is common cause that Applicant thereafter cancelled the agreement.

4.

Respondent's case, as I have said, is simply that no moneys were received from Applicant, but were received by way of a Mahlangu deposit. A copy of four cheques appears in the founding affidavit as annexures. They indicate that cheques were marked not negotiable, and were made payable to Delmas Nissan, and at the bottom of page 24, which reflects a cheque dated 26 June 2014 in the amount of R 220 000 made payable to Delmas Nissan, a stamp appears signed by Ms Morereane on the same day "original seen and copied by me". The same stamp and signature by Ms Morereane appears on page 25. The stamp of Delmas Nissan also appears thereon. Certain of some of the bank statements of the Applicant also indicate that some of these amounts were debited to his account.

5.

The defence of Respondent is on one hand based on inadmissible hearsay evidence, and on the other is so implausible that considering Applicant's version and annexures that he has presented in support thereof, I am able to reject it outright.

See: ***Room Hire Company (Pty) Ltd vs Jeppe Street Mansions Ltd 1949 (3) SA 1155 (T) at 116.***

There are dozens of decided cases to the same effect and where a litigant's defence is so implausible or unlikely, I am entitled to reject it, and find in favour of an Applicant without referring the matter to oral evidence. The defence is in fact absurd, to put it mildly. Whatever Ms Morereane did together with Mr Mahlangu cannot defeat Applicant's claim in this particular context, but in any event there is also no admissible evidence what they in fact did. Further, it must be accepted that Applicant had never heard of the particular Mahlangu until informed by Respondent's Attorney after the cancellation of the agreement.

Accordingly the following order is made:

1. **Respondent is to repay Applicant the amount of R 1.1 million with interest thereon as follows:**
2. **Interest on the sum of R 1.1 million at the rate of 15.5% per annum to the date of payment in full, and calculated as follows :-**

2.1 On the amount of R 300 000-00 from 9th April 2014;

2.2 On the amount of R 30 000-00 from 23rd April 2014;

2.3 On the amount of R 420 000-00 from 26th June 2014; and

2.4 On the amount of R 350 000-00 from 21 July 2014;

3. Costs of suit on the scale as between Attorney and client.

As far as costs are concerned according to my discretion, I have decided that there is no reason why the Applicant should be out of pocket in this particular context. Respondent's defence is based on unsubstantiated evidence on the one hand, and on implausible allegations on the other. To indicate my strong disapproval of its defence herein, I am entitled to make a punitive cost order.

JUDGE H.J FABRICIUS

JUDGE OF THE GAUTENG HIGH COURT, PRETORIA DIVISION

Case number: 74042/14

Counsel for the Applicant: Adv J. H. Lubbe

Instructed by: Sarlie & Ismail Inc Attorneys

Counsel for the Respondent: Adv P. J. Greyling

Instructed by: Odendaal & Kruger Attorneys

Date of Hearing: 5 August 2015

Date of Judgment: 11 August 2015 at 10:00