

IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Case No.: 2403/2013

In the matter between:

LEONIE BOSMAN N.O.
IZAK DANIEL BOSMAN N.O.

1st Plaintiff
2nd Plaintiff

and

MORTIMER TOYOTA (EDMS) BPK (REITZ)

Defendant

HEARD ON: 25, 26 & 28 NOVEMBER 2014

JUDGMENT BY: DAFFUE, J

DELIVERED ON: 23 MAY 2015

I INTRODUCTION

- [1] A farming trust and the Toyota dealership at Reitz, Free State Province are at loggerheads. A 2011 Toyota Hilux 3 litre 4X4 with registration letters and number DXT832FS (“the Hilux”) is the bone of contention.

II THE PARTIES

- [2] Leone Bosman and Izak Daniel Bosman, cited as first and second plaintiffs, are the trustees of the Izak Bosman Trust, IT1836/1991. I shall hereinafter refer to the trustees in the

singular as plaintiff. Adv J Y Claasen SC represented the plaintiff from the onset according to the pleadings in this Division as well as in the proceedings before me. Mortimer Toyota (Pty) Ltd, a Toyota dealership with branches in several towns as well as in the town of Reitz, is the defendant in this matter. It has been represented by Adv AWM Harcourt SC, assisted by Adv J J Meiring.

III THE DISPUTES ACCORDING TO THE PLEADINGS

- [3] Plaintiff claims damages based on breach of contract from defendant in the amount of R250 000,00 together with interest. It is the plaintiff's case that it, duly represented by the one trustee, Mr Izak Daniel Bosman ("Bosman") and defendant, duly represented by its branch manager at Reitz, Mr Dirk Wium ("Wium"), entered into an oral agreement during the beginning of February 2013 in terms whereof plaintiff delivered the Hilux to defendant to be placed on defendant's display floor for second hand vehicles and to be marketed on behalf of plaintiff at a selling price of R250 000,00. It is further alleged that defendant breached the contract by selling the vehicle without the knowledge and consent of the plaintiff at a selling price of R180 000,00 and that defendant delivered the vehicle to the purchaser without obtaining payment of the purchase price; consequently defendant parted with plaintiff's Hilux and failed to pay to plaintiff the agreed selling price of R250 000,00.

- [4] Several averments are disputed in the plea, but for purposes hereof and as matters transpired during the trial, the essence of defendant's defence is that Wium did not have any authority to conclude an agreement on behalf of defendant as alleged and consequently the agreement is denied. It is also alleged that plaintiff knew or ought reasonably to have foreseen that Wium did not have such authority. It is furthermore denied that plaintiff's claim constitutes an action for damages in the sum R250 000,00.
- [5] Plaintiff filed a replication, repeating that the defendant's representative was duly authorised to enter into the agreement with plaintiff, alternatively, that defendant should be estopped from denying Wium's authority. In this regard plaintiff pleaded that defendant was bound based on ostensible authority, relying on a number of factors which have been dealt with in the evidence to which I shall revert later. Pertaining to the claim for payment of R250 000,00, plaintiff reiterated that this amount represents the agreed selling price of R255 000,00 less defendant's commission of R5 000,00 in the event of a sale occurring, in which event and upon delivery of the vehicle to the purchaser, the amount of R250 000,00 would be payable to plaintiff forthwith.

IV VIVA VOCE AND DOCUMENTARY EVIDENCE

- [6] Bosman was plaintiff's only witness. He testified about the agreement allegedly entered into between plaintiff and defendant, the history of his dealings with defendant's predecessor, to wit Greyling Broers who for many years operated the Toyota dealership in Reitz, and he also referred to several documents contained in a bundle of documents received as exhibit "A". Wium, with whom Bosman negotiated and with whom the oral agreement on behalf of defendant was allegedly concluded, was not called as a witness by either plaintiff or defendant. A memory stick containing a video tape recording, clandestinely obtained by Bosman during a conversation between him and Wium has been handed in as exhibit "1" and a transcript of the conversation forms part of exhibit "A". I shall return thereto later.
- [7] Three witnesses testified on behalf of defendant, to wit Mr Cornelius Neethling ("Neethling"), a sales representative of defendant's Reitz branch, Mr Andries Johannes Stone ("Stone"), an employee of defendant's Bethlehem branch who was responsible for branch visits at Reitz from time to time and Mr Ryan Seele ("Seele"), a director of defendant who gave detailed evidence about the internal measures introduced by defendant since taking over the Toyota dealership on 1 September 2012.

[8] It is not my intention to summarise the versions of the various witnesses, but I shall firstly record the common cause facts, thereafter deal with legal principles, legislation and authorities and finally evaluate the evidence and submissions. The following are common cause, unless specifically stated otherwise:

- 8.1 The *locus standi* of first and second plaintiffs as the trustees of the Izak Bosman Trust and their authority to act on behalf of the trust in terms of the provisions of section 6 of the Trust Property Control Act, 57 of 1988. It was denied initially, but conceded during the hearing.
- 8.2 Plaintiff was the registered owner of the Hilux at all relevant times until February 2013.
- 8.3 Wium was at all relevant times the branch manager of defendant's Reitz branch which was a sub-branch of the Bethlehem branch. He was previously employed with Greyling Broers who conducted the Toyota dealership for many years from the same premises in Reitz until being taken over by defendant on 1 September 2012. Mr JM (Mike) Fourie ("Fourie"), who was a former director of the company that traded as Greyling Broers, remained on as sales representative and employee of defendant after the aforesaid take-over. Neethling was employed at the Bethlehem branch earlier, but became a sales representative of defendant at the Reitz branch sometime before February 2013.

- 8.4 Defendant's employees (the three sales representatives in particular) were not entitled to do private work in competition with their employer.
- 8.5 At the beginning of February 2013 Bosman brought the Hilux to defendant's premises in Reitz. The vehicle was inspected and he had a conversation with Wium, Fourie and Neethling. Neethling left the group after an altercation to which I shall refer later. Hereafter the Hilux was displayed in defendant's showroom for second hand vehicles.
- 8.6 There is uncertainty about the time, but Bosman brought another vehicle, a Toyota KZTE bakkie ("the KZTE"), to defendant's premises. It is Bosman's version that it was agreed with Wium that defendant would sell the KZTE on his behalf at a selling price of R80 000,00 or such lower amount as he might consent to. On 18 February 2013 Wium obtained plaintiff's bank account details and the amount of R70 000,00, a lower figure, but consented to by Bosman, was paid into plaintiff's bank account by way of a cheque, the depositor being reflected as Fourie. It became common cause during the trial that Fourie's personal cheque was deposited into the plaintiff's bank account.
- 8.7 A Tata bakkie, the property of plaintiff, was stored in the workshop on defendant's premises and during that time a transaction was concluded directly between plaintiff represented by Bosman and the purchaser, Mr Tiaan Willemse. The purchase price of R25 000,00

was paid directly into the bank account of the plaintiff by Mr Willemse and neither Wium, nor defendant had any role to play in the negotiations leading to the sale.

- 8.8 Four advertisements for the private sale of the Hilux appeared in the Landbouweekblad magazine of 8 and 15 February 2013 and 29 March 2013 and 5 April 2013 respectively. The Tata was also advertised for sale, but the telephone number of Bosman's son was provided in that instance. It is Bosman's evidence that he was responsible for the first two advertisements and he could not explain the second two advertisements, save to state that just before he left for overseas on 27 March 2013 he instructed Wium to place further advertisements in the Landbouweekblad. The telephone number in all four advertisements is the same, but the last two advertisements specifically refer to the name Thabo for purposes of enquiry. It is common cause that this is Bosman's first name.
- 8.9 On 12 February 2013 defendant's Reitz branch received a fax from plaintiff comprising of a number of documents including a Traffic Register Number Certificate issued in 1996 but with no reference to any vehicle, first plaintiff's identity document, her letter of proxy, as well as the Letters of Authority issued to the two trustees. Defendant's counsel are mistaken insofar as they submit that these documents have any bearing on the Hilux transaction. The Hilux' first year of registration is 2011.

- 8.10 On 14 February 2013 an electronic internet bank payment of R180 000,00 was apparently made, not into the account of either plaintiff, or defendant, but to an entity identified as DNT Motor Mechanic and Spares (Pty) Ltd. This entity is unknown to the parties.
- 8.11 On 18 February 2013 and according to the documentation provided, a certain Gerrie Steynberg confronted Wium with proof of this alleged payment as well as an affidavit deposed to by him at the Reitz Police Station concerning payment of R180 000,00. On that day Wium released the Hilux to Steynberg. Whether it is merely a co-incidence or not, it is peculiar that the R70 000,00 deposit in respect of the KZTE was made on 18 February 2013, the same day when the Hilux was delivered to Steynberg.
- 8.12 On 22 February 2013 the Hilux was transferred according to the Natis system from the name of plaintiff into the name of one A D Venter and on 26 February 2013 Barloworld Toyota Menlyn (Pty) Ltd paid AD Venter R235 000,00 for this vehicle and obtained registration of transfer.
- 8.13 When Bosman had his telephonic conversation with Wium on 27 February 2013, Wium did not disclose that the Hilux had been sold and delivered to Steynberg.
- 8.14 When Bosman returned from abroad he had contact with Wium whereupon he received the above documents and discovered that the plaintiff's Hilux had apparently been sold, that neither plaintiff nor

defendant received the alleged purchase price and that Wium was apparently “...duped into parting with the Hilux to a confidence trickster”, a submission by defendant’s counsel which I find hard to accept, bearing in mind Wium’s admissions during his disciplinary hearing to which I shall return.

8.15 Bosman laid theft and fraud charges with the South African Police Service immediately, but eventually filed an urgent application, relying on the *rei vindicatio*, against Barloworld Toyota Menlyn (Pty) Ltd as first respondent in which application defendant was cited as second respondent although the application papers were never served upon defendant. This application was heard as an opposed motion, but dismissed with costs. Hereafter Bosman decided to confront Wium in private which conversation was clandestinely videotaped and recorded. By then, neither Bosman, nor his attorneys of record had any contact with the directors of defendant and no letter of demand was sent to defendant.

8.16 Fourie and Wium were charged for misconduct. Wium admitted guilt in that he allowed the plaintiff’s vehicles to be stored at defendant’s premises in contravention of company policy. He also admitted that he and/or Fourie sold two vehicles (the Hilux and KZTE) without the knowledge of defendant and that it was his intention to retain the full proceeds or profit margin personally. It should be mentioned that Wium was

charged with storing all three vehicles referred to above on defendant's premises for possible re-sale in contravention of clause 4 of the Motor Industry Main Agreement which applied to him as employee.

8.17 Although defendant introduced several internal measures after taking over the Toyota dealership in Reitz, the public at large and plaintiff in particular was not advised of these measures, either by mail, advertisements, or other notices.

8.18 Seele's testimony was not really contested in cross-examination and his version should be regarded as common cause. The effective date of the takeover of the Reitz dealership was 1 September 2012. The Reitz staff members were inducted and the basis of their employment with defendant was explained to them by one of defendant's directors. Wium agreed in writing to the so-called "staff induction checklist" and one of the items explained on the checklist was the issue of private work which employees of defendant are not entitled to do. Clause 4 referred to above was *inter alia* made applicable to employees and it reads as follows:

"Clause 4: Outwork. No employee shall: (a) solicit or take orders for or undertake any work falling within the scope of the Motor Industry as defined in this Agreement, whether for gain or not, other than for his employer:....."

Seele testified extensively about defendant's various internal systems governing the taking in of second

hand vehicles that clearly rendered private work an aberration and anomaly. He explained that second hand car dealers like defendant have to comply with the provisions of the Second Hand Goods Act. This Act provides for record keeping by dealers in respect of the acquisition or disposal of second hand motor vehicles. Members of the South African Police Force are entitled in terms of the Act to do inspections and to confiscate vehicles which are not dealt with in accordance with the provisions of the Act. Defendant's sales representatives were aware of the significance of the particular legislation, i.e. the Second Hand Goods Act as well as the Consumer Protection Act. Defendant is not in the business of selling clients' second hand motor vehicles for commission. Wium and all other sales representatives of defendant were fully aware of the defendant's policy and the risks involved in acting as such, with particular reference to section 56 of the Consumer Protection Act. Defendant as a supplier of second hand motor vehicles is bound by the provisions of this section which *inter alia* states that a consumer may within 6 months after delivery of a second hand motor vehicle return the vehicle to the supplier without penalty and at the supplier's risk and expense. Seele admitted that the public at large was not informed of defendant's internal policies in any manner whatsoever.

8.19 The takeover of the Toyota Dealership in Reitz was however well advertised. The fact of the matter is that defendant does not have a consignment system in place in terms whereof vehicles are sold as agent for owners. Defendant cannot invoice purchasers in respect of any sales if the vehicles are not part of their own stock. Wium who previously worked for Greyling Broers was regarded by defendant as a trustworthy and reliable person and he was appointed as branch manager of defendant's Reitz branch on the recommendation of the directors of Greyling Broers.

8.20 Plaintiff's three vehicles, i.e. the Hilux, KZTE and Tata were never purchased by defendant, did not form part of defendant's stock and were never advertised for sale in any of defendant's advertisements. There is no evidence that the KZTE was displayed in defendant's showroom. The Tata was stored in defendant's workshop and never displayed in the showroom. The Hilux was displayed in the showroom, albeit for a few days and notwithstanding the circumstances and evidence to be considered later.

[9] The admissibility of the video tape recording and the transcript of the conversation between Bosman and Wium were initially objected to. Reliance was placed on several grounds, *inter alia* it being an invasion of privacy, the putting of leading questions by Bosman to Wium and the fact that the recording was made clandestinely. It was not objected to

on the basis of accuracy. I provisionally admitted the transcript which forms part of exhibit “A” and the memory stick containing the video recording as exhibit “1” on the basis that I would eventually consider the issue of admissibility at the end of the trial. However defendant is now satisfied that the video recording and transcript may be admitted as evidence, although consideration should be given to the weight to be attached thereto. Defendant’s concession is easy to explain. Instead of being to the advantage of plaintiff, the video tape recording and transcript tend to support defendant’s submissions and also show inconsistencies in Bosman’s version. I will deal with this later during the evaluation of the evidence.

V LEGAL PRINCIPLES, LEGISLATION AND AUTHORITIES

- [10] The proper approach to assessing facts begins with an evaluation and assessment of the credibility of relevant witnesses, their reliability and the probabilities. The often quoted formulation of Nienaber JA in **Stellenbosch Farmers’ Winery Group and Another v Martell et Cie and Others** 2003 (1) SA 11 (SCA) at para [5] in dealing with two irreconcilable versions is apposite:

“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."

- [11] In so far as plaintiff relies on breach of contract, the onus to prove the contract, the breach thereof and contractual damages rests squarely on the shoulders of the plaintiff. This is trite: he who alleges, must prove. In my view plaintiff effectively conceded that Wium was not actually authorised to enter into the particular transaction on behalf of defendant

with plaintiff, and therefore Bosman's evidence was led with the aim to show that defendant should be held liable on the basis of ostensible authority and that it should be estopped from relying on the true facts. In this regard the onus is on plaintiff to prove the requirements set out in the authorities. In **Glofinco v Absa Bank Limited t/a United Bank** 2002 (6) SA 470 (SCA) at para [12] the SCA stated the requirements for holding a principal liable on the basis of ostensible authority of his agent as follows:

"[12] The requirements for holding a principal liable on the basis of the ostensible authority of its acknowledged agent were recently articulated in *NBS Bank Ltd v Cape Produce Co (Pty) Ltd and Others* (*supra* in para [26] at 412C-E) by Schutz JA to be:

- '1. A representation by words or conduct.
2. Made by [the principal] and not merely by [the agent], that he had the authority to act as he did.
3. A representation in a form such that [the principal] should reasonably have expected that outsiders would act on the strength of it.
4. Reliance by [the third party] on the representation.
5. The reasonableness of such reliance.
6. Consequent prejudice to [the third party]"

See also **NBS Bank Ltd v Cape Produce Co (Pty) Ltd** 2002 (1) SA 396 (SCA) paras [24] – [37] and **Absa Ltd v Arif** 2014 (2) SA 466 (SCA) paras [29] – [34].

[12] As stated in **Glofinco** *loc cit* at para [14], relying on **NBS Bank Ltd v Cape Produce Co (Pty) Ltd** and **South African**

Eagle Insurance Co Ltd v NBS Bank Ltd 2002 (1) SA 560 (SCA) at 574E-G, the appointment of someone to a position of authority, “but with all trappings pertaining to the post, is a factor that in itself is not to be underestimated.” Nienaber JA stated further in para [14] of **Glofinco** *loc cit* as follows:

“Of course that does not mean that a bank is liable to a third party *ex contractu* for all the actions and transactions of the branch manager when the latter is in truth minding not the bank’s business but his own.”

Marais JA was at pains to state that in dealing with the scope of a branch manager’s authority to bind a bank it remains a question of fact to be decided on a balance of probability and he also referred to the position of a manager of a second hand motor dealer in the following words at 573H – 574B of the **SA Eagle Insurance** judgment:

“On the other hand, the manager of a business the sole activity of which is the buying and selling of used motor vehicles may well be justifiably thought to have been empowered by the proprietor to negotiate purchases and sales for that is the manager’s publicly proclaimed *raison d’être*. (**Reed NO v Sager’s Motors (Pvt) Ltd** 1970 (1) SA 521 (RA).) In each case, it is the particular facts which will provide the answer.” (emphasis added.)

[13] At para [17] of **Glofinco** Nienaber JA reiterated the following:

“[17] Internal limitations of which outsiders who do business with the branch manager are unaware will not bind them. This is a principle as old as the law of agency itself.”

See also: **City of Tshwane Metropolitan Municipality v RPM Bricks (Pty) Ltd** 2008 (3) SA 1 (SCA) para [12].

[14] It is also important to remember that in order for ostensible authority to be relied upon, the representation must have been created by the principal and not the agent. A person holding himself out as the principal's agent cannot, of itself, impose liability on the principal. See **LAWSA**, 3rd edition, volume 1 para [160], with reference to **NBS Bank Ltd v Cape Produce Co (Pty) Ltd** *loc cit* at para [25] where it was also stated that it is not enough that an impression was in fact created as a result of the representation as it is also necessary that the representee should have acted reasonably in forming that impression. It should be mentioned at this stage that Mr Vito Assante, the NBS bank manager who featured in both NBS Bank judgments quoted above had actual authority to represent the Bank in that capacity. In the one matter concerning SA Eagle the court found at paragraph 30 that the Bank could not shelter behind the fact that Assante exceeded limitations placed upon the precise extent of his authority, or that he failed to follow internally prescribed standard procedures. In **Glofinco** the majority found that the respondent bank was not liable for the actions of its manager. It concluded in paragraph 30 that the

representee, (Braude), acted throughout not on representations of the bank, but on reassurances of the manager and therefore the replication of estoppel was not upheld.

[15] The reliance by the third party on the representation must be reasonable as mentioned above. It was found in the **Cape Produce** judgment *loc cit* that a facade of regularity was created by the appointment of the bank manager who made it possible for him to disregard any internal control measures and to embark upon schemes of dishonesty. See also **SA Broadcasting Corporation v Coop** 2006 (2) SA 217 (SCA) at 237A.

[16] The burden of proof rests on the person who relies on estoppel. The representee has to show that he was misled, i.e. that a certain state of facts exist which actually does not exist. He should have been misled by the person who he seeks to hold liable as principal or by someone for whose conduct such person is responsible. See **LAWSA**, 3rd edition, volume 1, para [161]. The person relying on estoppel must show that reliance on a representation was reasonable. See also: **Dlisane v Minister of Correctional Services; Mathwetha v Minister of Safety and Security** 1999 (1) SA 1020 (TKH) at 1034D – G. If a person knows or believes that the real facts are not as stated in the representation, he cannot be heard to say that he was induced to act to his prejudice on the faith of the

representation. See **Hauptfleisch v Caledon Divisional Council** 1963 (4) SA 53 (CPD) at 57C.

[17] If a person wilfully shuts his eyes and declines to see what is perfectly obvious, he must be held to have had actual knowledge of it. See **Grant v Stonestreet** 1968 (4) SA 1 (AD) at 20 and further and **Southern Life Association Ltd v Beyleveld NO** 1989 (1) SA 496 (AD) at 507H.

[18] Much reliance was placed by defendant's witnesses on defendant's internal policies, the Second Hand Goods Act and the risks involved in purchasing and selling second hand motor vehicles. The Second Hand Goods Act, 6 of 2009 came into effect on 30 April 2012, being its date of commencement. It repealed the old Second Hand Goods Act, 23 of 1955 in whole. The purpose of the Act is to regulate the business of dealers in second hand goods and pawn brokers in order to combat trade in stolen goods, to promote ethical standards in the second hand goods trade and to provide for matters connected therewith. All dealers, i.e. persons who conduct business dealing in second hand goods, including scrap metal dealers and pawn brokers, must in accordance with section 21 of the Act keep registers in the prescribed form and record in the registers the prescribed particulars regarding every acquisition or disposal of second hand goods. Section 24 of the Act stipulates that subject to section 21, a dealer dealing in second hand motor vehicles must also record in the prescribed register the

particulars regarding every acquisition or disposal of a motor vehicle contemplated in subsection 24(2). The information is required in respect of the vehicle identification number, the chassis and engine number, the odometer reading, exterior and trim colour and any distinguishing mark or feature in respect of the particular vehicle. Subsection 24(3) stipulates the details to be obtained from a person acquiring from or disposing of a motor vehicle to the dealer. Chapter 8 of the Act deals with the authority of police officials. The evidence tendered on behalf of defendant confirms that the witnesses had these wide powers and serious consequences in mind.

- [19] Defendant also relies on the Consumer Protection Act, 68 of 2008 (“the CPA”), for the introduction of its internal measures and regulations to which its employees are bound. A “*supplier*” is defined in the CPA as “*a person who markets any goods or services*”. A consumer is entitled to safe and good quality goods as apparent from section 55 of the CPA and therefore section 56 of the CPA provides for an implied warranty of quality. Section 56(1) reads as follows:

“In any transaction or agreement pertaining to the supply of goods to a consumer there is an implied provision that the producer or importer, the distributor and the retailer each warrant that the goods comply with the requirements and standards contemplated in section 55 except to the extent that this goods have been altered contrary to the instructions, or after leaving the control, of the producer or importer, distributor or retailer, as the case may be.”

The consumer may in accordance with section 56(2) return the goods to the supplier within 6 months after the delivery thereof without penalty at the supplier's risk and expense if the goods fail to satisfy the requirements and standards contemplated in section 55 and the supplier must at the direction of the consumer either repair or replace the failed, unsafe or defective goods or refund to the consumer the price paid by him for such goods. Subsection 56(3) is also of importance and indicative of the risks undertaken by *inter alia* suppliers of goods and retailers. There cannot be any doubt that defendant falls within the definition of supplier and is bound by the provisions of the CPA and in particular section 56 thereof.

VI EVALUATION OF THE EVIDENCE AND ADMISSIONS OF THE PARTIES

[20] Bosman is the only witness who testified in detail in respect of the alleged agreement pertaining to the Hilux entered into between plaintiff represented by him and defendant represented by Wium at the beginning of February 2013. Neethling accompanied Fourie and Wium upon Bosman's arrival in order to inspect the Hilux and his evidence related to the conversation between him and Bosman until the time that he decided to leave the others. Mr Claasen on behalf of plaintiff submitted that in so far as there are contradictions between the versions of Bosman and Neethling, Bosman's version should be accepted. According to him Neethling is

an unreliable witness. I accept that criticism can be levelled at his evidence in certain instances, but I am satisfied that he provided a plausible version. It cannot be denied that Bosman's son had contact with him at a stage about a possible trade-in of the Hilux, being the vehicle used by the son and that he was under the impression that the vehicle was brought in for a valuation in order to consider at what price it could be acquired. Neethling did duty at the showgrounds during that time to prepare for the Bieliemielie festival and his uncertainty about events at the dealership was duly explained. He warned Wium that he was not entitled to enter into private deals with Bosman and his evidence in this regard is uncontradicted. It appeared that Wium did not heed his warning as is apparent from the minutes of his disciplinary hearing. His version of the condition of the Hilux and his comments in that regard is more probable than Bosman's version for the reasons to be mentioned later.

- [21] It is also Mr Claasen's submission that Bosman was a client of Greyling Broers for many years, that he had sold vehicles to them and purchased vehicles from them on many occasions and that he on a weekly basis attended the dealership in order to *inter alia* buy spare parts or bring in vehicles for service. It may not be wrong to describe Bosman as a true "Toyota man". Plaintiff also bought a second hand Toyota vehicle to be used by Bosman's son just before February 2013. Although Bosman was aware of

the takeover of the dealership by defendant in 2012, nothing has changed as far as he was concerned and he regarded it as “business as usual”. It was never brought to his notice that defendant’s sales representatives were not entitled to sell motor vehicles on behalf of clients to third parties for commission. I am of the view that if it can be accepted that Greyling Broers sold second hand vehicles on behalf of plaintiff in the past, he as a businessman and attorney should have made enquiries from defendant – a company of outsiders unknown to him, with many branches and a head office in Kwazulu-Natal – whether it would be prepared to act as agent in the selling of the plaintiff’s vehicles. This he failed to do. Plaintiff cannot rely with success on the version that defendant’s internal measures were unknown to it. A reasonable deduction to be made from the evidence of Bosman, if he is to be believed, is that he preferred to shut his eyes and declined to see what was perfectly obvious. Plaintiff must be held to have actual knowledge of defendant’s Automark business and the manner in which it operated. I deal with the Automark brand again later.

- [22] Instead of contacting defendant’s head office and/or written a letter of demand to defendant immediately on 12 March 2013 after being informed that defendant had breached the contract between the parties causing plaintiff to suffer damages as defendant failed to pay to plaintiff the agreed amount of R250 000,00 upon delivery of the Hilux to the purchaser, he laid complaints of theft and fraud with the

South African Police Service. He did not accuse defendant of any criminal activities. When it dawned upon him that the SAPS had dropped the theft charge, causing the vehicle not to be “flagged” anymore, meaning that whoever was in possession thereof would be able to deal with it as he or she deemed fit, he instituted urgent proceedings in the High Court, Pretoria against Barloworld Toyota Menlin (Pty) Ltd as first respondent to prohibit it from dealing with the Hilux pending finalisation of an application for delivery of the Hilux to plaintiff. Although defendant was cited as second respondent, the application papers were not even served on it. When this application was eventually dismissed, Bosman still did not communicate with defendant and/or forward a letter of demand to it, claiming the plaintiff’s contractual damages. Instead Bosman confronted Wium in private and clandestinely recorded the conversation on video tape.

- [23] I watched the video tape recording as I was invited to do and I have no doubt in my mind that Bosman used bullying tactics in the process of putting leading questions to Wium in order for Wium to admit that he acted on behalf of defendant in the hope that this evidence could be used to hold defendant liable as principal – incorrectly as Bosman seemed to believe, on the basis of vicarious liability as if delictual liability was at stake. Wium, who eventually admitted during his later disciplinary hearing that he and Fourie facilitated or attempted to facilitate the sale of plaintiff’s vehicles without the knowledge of defendant with

the intention to retain the proceeds or profit margins personally - the same person who was regarded as trustworthy and reliable - was either completely naïve when he parted with the Hilux, or (and more probably) a fraudster who participated in a scheme to prejudice plaintiff, was clearly at a disadvantage and in discomfort during the interview. His overall expression was that of being browbeaten. I am not prepared to accept Bosman's explanation for making the video recording. If he was confident that Wium had actual authority to enter into the transaction on behalf of defendant with plaintiff it would really not be necessary to obtain the evidence that he tried to obtain. Surely, he should have known, on his version, that Fourie in particular, and possibly Neethling, would be able to confirm his version. It was all along plaintiff's case that Wium as branch manager had actual authority to conclude the deal on behalf of defendant and it raised the issue of ostensible authority and estoppel for the first time in the replication. I accept that it is trite that estoppel cannot be raised as a cause of action.

- [24] Bosman's version that he does not read the Vrystaat newspaper, it being a Bethlehem publication also distributed in Reitz according to him, struck me as highly improbable. There was no cross-examination in this regard but his version cannot be correct. I find it highly unlikely and improbable. He obviously tried to steer away from any knowledge of the several advertisements placed by

defendant under the Automark brand in the newspaper and the fact that none of his vehicles were ever advertised by defendant as apparent from these advertisements. I do not accept that a person of Bosman's stance in the community who deals regularly with the Toyota dealership in Reitz and often buy and sell Toyota vehicles never reads defendant's advertisements as they appear from time to time in the Vrystaat newspaper.

- [25] It is not contested that defendant has Toyota (new vehicles) and Automark (used vehicles) dealerships in various towns in the Eastern Free State and Natal. Greyling Broers previously conducted a Toyota and Automark dealership business in Reitz, but since 1 September 2012 defendant commenced with an Automark dealership in Reitz for its own account, but it does not keep new Toyota vehicles on its floor in Reitz. The Automark dealership entitles a dealer to conduct second hand vehicle retail business, usually together with a Toyota parts and service business, using the distinctive Automark signage. The first of plaintiff's photographs appearing in exhibit "A" shows the premises of the Toyota dealership with the distinctive Automark logo clearly displayed. Ironically, this photograph, as well as others, has been taken by Bosman. Defendant's advertisements in the Vrystaat newspaper indicate in no uncertain terms that Automark certified used vehicles are being offered for purchase. The so-called "Automark belofte", containing seven requirements for vehicles to be

sold under the Automark brand, appears vividly in each of the advertisements. Bosman visited the Toyota dealership in Reitz on a weekly basis, but stated in cross-examination that he had never heard of the “Automark belofte”, not even to speak of the seven requirements contained therein. I find this just as far-fetched and improbable as Bosman’s version that he does not read the Vrystaat newspaper, trying to distance himself from the newspaper on the basis that it is a Bethlehem newspaper distributed in Reitz. The extracts of the newspaper contained in exhibit “B” clearly show that the newspaper does not only contain news pertaining to Bethlehem and Reitz, but even news of an athletics meeting held by the High School Wilgerrivier in Frankfort, a neighbouring town of Reitz. Petrus Steyn, the district in which Bosman farms and the town in which he conducts his attorney’s business, is also a neighbouring town of Reitz. Bosman frequently finds him in Reitz on his own version. I cannot believe that he, an Afrikaans speaking person, does not read Vrystaat, an Afrikaans community newspaper. If he would have read the newspaper during the month of February 2013 he would have noticed that none of his vehicles were advertised by defendant under the Automark banner, or at all.

[26] I am confronted with two diametrically opposed versions pertaining to the inspection of the Hilux and the conversation entered into at that stage. As mentioned, Neethling testified that he had been contacted previously by Bosman’s son who

indicated that he wanted to trade in the Hilux for a new vehicle. Upon inspection of the Hilux he was prepared to make an offer for R238 000,00. Repairs had to be done to the front fender and new rubberising had to be installed, whilst the tyres were worn and had to be replaced. Bosman denied that the tyres were worn or that this was even mentioned and his version was that the Hilux should be sold in that same condition. Strangely enough the figure of R238 000,00 surfaced at a stage, even on the version of Bosman, who testified that he had been informed at a later stage that defendant could get a cover price for the vehicle in the amount of R238 000,00. As mentioned earlier I am of the view that the probabilities as to what happened at this meeting favour defendant, but are even at best for Bosman. I cannot see why Neethling would have left the conversation if Bosman merely jokingly asked him “om nie sy Bethlehem maniertjies hier uit te haal nie” with reference to the repairs to be made to the Hilux. Neethling’s version that he felt insulted by the manner in which his offer was rejected and therefore left is more probable. Bearing in mind the odometer reading of the Hilux of just over 70 000 km and the evidence that a set of tyres would last between 30 000 and 40 000 km, it is probable that the Hilux was on its second set of tyres, that these were in fact not suitable and would have to be replaced in order to resell the vehicle under the Automark banner.

- [27] I am not so convinced as defendant's counsel that Bosman's instruction to Wium to sell the Hilux "uit die hand uit" of necessity meant that it was an instruction to Wium and/or Fourie to sell without the authority of defendant. On its own, it would not be enough to make a negative finding against plaintiff, but this instruction and/or arrangement must however be considered together with the factual matrix relating to the three vehicles of plaintiff that Bosman wanted to dispose of.
- [28] It is Bosman's evidence that the KZTE was handed over for selling purposes before the Hilux, but on the video tape recording he indicated to Wium that he handed over the vehicles simultaneously. This last version cannot be correct as neither Bosman, nor Neethling mentioned any discussion about the KZTE. I agree with defendant's counsel that the manner in which Bosman dealt with the KZTE and the Tata provides a parallel to his approach in respect of the Hilux. There is sufficient merit in the argument that Bosman wanted to have his cake and eat it. Plaintiff wants the court to find on the one hand that he was bamboozled into a contract with the Hilux – the defendant not informing him of its internal procedures – while the other two vehicle sales proceeded outside the parameters of defendant's control and auspices to the advantage of plaintiff. Bosman tried to treat the Tata transaction as totally unrelated and with no bearing on the dispute before the court because it suits him to do so. However he attempted to rely on the KZTE transaction to

found an unjustified estoppel defence. Plaintiff's pleaded case is different. In the replication it is stated as follows:

“Op presies dieselfde wyse het die eisers in die verlede tweedehandse voertuie verkoop en nuwe voertuie aangekoop by die verweerder en deur bemiddeling van die betrokke werknemer, Mnr Dirk Wium.”

1.3.10 Die verweerder se verteenwoordigers se magte het onder andere ingesluit, soos in die verlede, die bevoegdheid om 'n ooreenkoms in die vorm en met die terme van die ooreenkoms tussen die trust en die verweerder te sluit.”

In response hereto the following further particulars were asked for purposes of trial:

“What are the particulars of the ‘soortgelyke ooreenkomste’ that the defendant allegedly permitted Mr Dirk Wium to conclude on its behalf with third parties?”

Plaintiff responded hereto as follows:

“Die besigheid was voorheen bekend as Greyling Broers en het die eiser vele soortgelyke transaksies met hulle aangegaan en die jongste transaksie is met Mnr Dirk Wium van verweerder aangegaan met betrekking to 'n 3 liter Toyota bakkie.”

This 3 litre Toyota bakkie is the KZTE referred to herein. The KZTE transaction was concluded finally and payment made as late as 18 February 2013 and thus after the alleged

agreement pertaining to the Hilux in the beginning of February. Bosman's evidence is in direct contrast with plaintiff's pleadings. As was the case with the Hilux, the Tata was advertised in the Landbouweekblad with Bosman son's cellphone number. This vehicle was stored in defendant's workshop. A private deal was entered into between Bosman and the purchaser and not one of defendant's sales representatives entered into any negotiations in that regard. The purchase price was paid directly into the plaintiff's bank account by the purchaser and no commission *ex facie* the evidence was ever paid over to defendant. No tax invoice was issued by plaintiff according to the evidence.

- [29] The KZTE was apparently not displayed in the display room for second hand vehicles on defendant's premises. If it was the case I would have expected Bosman to inform us about this. Again, unlike as Bosman tried to indicate, no tax invoice was issued in this regard as well. It could not have been issued by plaintiff to defendant as defendant did not purchase the vehicle. It could not have been issued to the purchaser as Bosman was not even aware of the name of the purchaser and the prize the purchaser paid for the KZTE. He only knows that the plaintiff has received a cheque in the amount of R70 000,00, paid into its bank account by Fourie. Bosman's predicament in trying to explain value added tax legislation and the consequences upon a transaction of this nature is indicative of the unbusinesslike manner in which he allegedly contracted with Wium.

[30] After delivery of the Hilux to Wium in order to sell it on plaintiff's behalf according to Bosman, he had negotiations with a certain Andrew of Ellisras, he being a possible purchaser. He never mentioned this in his evidence in chief although reference was made thereto in the application papers in the urgent application brought against Barloworld in the Pretoria High Court. Again in that case, he never asked Wium or anybody else of defendant to enter into negotiations on plaintiff's behalf as one would have expected, bearing in mind Bosman's version that in the event of a purchaser reacting to his Landbouweekblad advertisement, defendant would be entitled to R5 000,00 commission. Andrew never came up with the money that was supposed to be paid directly into plaintiff's bank account (or as Bosman testified, his account.) In cross-examination Bosman suggested that if the transaction with Andrew would have gone through, he would have paid the R5 000,00 commission over to defendant. This is, as argued on behalf of defendant, unconvincing as Bosman apparently did not keep defendant and/or Wium and/or Fourie up to date with his negotiations with Andrew.

[31] Contrary to plaintiff's pleaded case, Bosman who specifically relied on the KZTE transaction as the most recent transaction in order to succeed with the claim based on ostensible authority and reliance on estoppel, did not testify that that transaction was concluded earlier than the

agreement in respect of the Hilux. Plaintiff failed to prove its case. It is clear that the KZTE transaction was not concluded prior to the negotiations pertaining to the Hilux, but some time later. In any event it should have been clear to Bosman when he obtained a copy of the plaintiff's bank statement to ascertain whether the R70 000,00 was deposited in respect of the KZTE, that it was done by way of a cheque deposit. Red lights should have started to flash pertaining to the identity of the depositor, the clearance of the cheque and particularly in so far as the cheque was not from an established Toyota dealership such as defendant. As mentioned above, this transaction does not support plaintiff's pleaded case.

- [32] It is interesting to note that one of the so-called terms of the agreement entered into in respect of the Hilux according to plaintiff is that it was an implied, alternatively tacit term of the agreement that the defendant as motor vehicle dealer would register the vehicle as part of its dealer's stock. On Bosman's version he was not even aware of such a requirement and it only came to his knowledge during the urgent application in the Pretoria High Court. He obviously misconceived the whole idea and did not understand that a motor vehicle can only form part of a dealer's stock if it is acquired by the dealer and only then is it necessary to act in accordance with the provisions of the Second Hand Goods Act. It is not plaintiff's case that it sold the Hilux to defendant

and this co-called implied, alternatively tacit term pleaded does not make sense and is immaterial.

[33] Bosman's version is inherently improbable. There are internal contradictions in his evidence and also external contradictions with what was pleaded and other objective facts. I am not prepared to find that an agreement was entered into as alleged.

[34] Even if it could be found that defendant was in the business of marketing vehicles on behalf of clients, I furthermore find it improbable that defendant's sales representatives would be prepared to accept the Hilux for purposes of selling it on behalf of plaintiff at a prize much higher than the value placed on the vehicle, to wit R238 000,00 and in the condition it was. I also find it improbable that, in such a case, defendant's sales representatives would be prepared to display the Hilux in defendant's showroom while they were aware of the fact that Bosman had advertised the vehicle personally with his personal details and would be able to compete with them in the selling of the vehicle. Obviously it might be worthwhile for a dishonest sales representative to try and sell the vehicle on the side and without the transaction going through defendant's books and thereby making some money on the sideline.

[35] I accept the version of Stone to the effect that during one of his regular inspections of the Reitz branch, he found the

Hilux on defendant's showroom floor, whilst it did not form part of defendant's stock. He enquired from Wium in this regard who told him that it was a bakkie belonging to a farmer whereupon he instructed him to remove the vehicle. At the next visit the vehicle was in fact removed from the showroom floor. It is true that he mentioned in cross-examination that the vehicle was removed in his presence whilst he did not particularly testify about this in his evidence in chief. Stone had no reason to make up a story and I find his version probable. I accept also that neither he, nor any other employee of defendant contacted Bosman to inform him that the Hilux could not be displayed on defendant's showroom floor and had to be removed.

- [36] I am satisfied that Bosman, being a businessman and attorney, well-known at the Reitz dealership and frequently visiting Reitz, tried to present himself as the proverbial stranger in Jerusalem. He must have been aware of the factual material relied upon by defendant pertaining to acquiring and selling of motor vehicles, the Automark dealership, what the Automark guarantee contains, that legislation such as the Consumer Protection Act was promulgated to protect consumers and that retailers and suppliers such as second hand motor vehicle dealers are at risk in dealing with such vehicles. I do not want to attribute to him detailed knowledge of either the Second Hand Goods Act or the Consumer Protection Act, but merely basic knowledge.

[37] The facts *in casu* are clearly distinguishable from those in the two NBS Bank judgments. Assante, the bank manager in those matters, was given wide and general powers and a façade of regularity was created by the bank. The members of the public that dealt with him relied on the representations by the bank and they acted reasonably. In **Glofinco** on the other hand, the court accepted the principles enunciated in the NBS Bank judgments, but found in favour of the bank for the reasons set out. *In casu*, defendant never represented to the public that it was in the business of selling vehicles on behalf of customers for commission. It is an Automark dealer in respect of its second hand vehicles. It is prepared to put its stamp of approval on all vehicles purchased for resale to the public and therefore it certifies its vehicles as such and is prepared to give its Automark promise to its customers. The mere fact that Wium was appointed branch manager was simply not enough to hold defendant liable based on ostensible authority if the totality of the evidence is considered.

[38] In conclusion I find that no actual agreement, either express or implied, was concluded as alleged and furthermore, plaintiff has not proved the requirements for holding defendant liable on the basis of ostensible authority and it has not proven to be entitled to rely on estoppel. There is no indication that defendant, and not its employee, Wium, represented by words or conduct that Wium and/or Fourie

had the authority to act as agents to sell second hand motor vehicles on behalf of clients for commission. That is not defendant's business. It purchases second hand vehicles from customers and sells new and second hand vehicles to customers.

[39] The claim should be dismissed. Mr Claasen did not argue that in the event of defendant being successful, it should not be awarded costs with the inclusion of the costs of two counsel. I am of the view that the matter is sufficiently intricate and important to the parties to warrant the appointment of two counsel and my costs order shall reflect this.

VII ORDER

[40] Therefore I make the following order:

1. The plaintiffs' claim is dismissed with costs, such costs to include the costs of two counsel.

J. P. DAFFUE, J

On behalf of plaintiff:

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Instructed by:
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BLOEMFONTEIN

On behalf of defendant

Adv. A. W. M. Harcourt SC
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