

(N THE NORTH GAUTENG HIGH COURT, PRETORIA
[REPUBLIC OF SOUTH AFRICA]



CASE NUMBER: 23802/11

DATE: 05/02/2013

In the matter between:

HENDRIK JOSEPHUS MALAN

Plaintiff

and

NICOLAAS JANSE VAN RENSBURG

1st Defendant

E M KRIEL

2nd Defendant

JUDGMENT

MNGQIBISA-THUSI, J

1. The plaintiff instituted an action against the first defendant in which he is claiming payment of an amount of R120 000.00 on the ground that the first defendant has been unduly enriched after the motor vehicle he had sold to the plaintiff and for which he was duly paid was confiscated by members of the South African Police Service after it was identified as a stolen

vehicle.

2. In his amended particulars of claim the plaintiff alleges that on 9 June 2010 he entered into a written sale agreement with the first defendant for the purchase of a motor vehicle. The agreed purchase price was R120 000.00 of which he paid R94 000.00 in cash and R24 000.00 through electronic transfer into the account of the second defendant. He testified that during August 2010 that he had resold the motor vehicle to Motor vehicle Kings for R150 000.00. However he had to repay Motor vehicle King the purchase price after it was discovered that the motor vehicle was a stolen vehicle.

3. The plaintiff obtained default judgment against the second defendant after he failed to enter appearance to defend. However, all attempts by the sheriff to execute against the second defendant have been futile because his place of residence is always locked and the second defendant does not respond to any communication

4. These proceedings therefore pertain only to the first defendant, hereafter referred to as 'the defendant'.

5. In his plea the defendant admits selling the relevant motor vehicle to the plaintiff but alleges that he was acting in his capacity as an agent of Ekcard Kriel ("Kriel"), the former second defendant. Further, the defendant denies receiving any monies from the plaintiff.

6. At the hearing there was agreement that there would be no separation of the merits and quantum.

7. The plaintiff testified that after seeing an advertisement on the Gumtree web site of the sale of a Toyota Hilux Raider (“the motor vehicle”), he had contacted the person whose contact details were on the advertisement, indicated his interest to buy the motor vehicle and an appointment was made for him to view and inspect the motor vehicle. On 9 June 2010 he, together with his friend, Peet Van der Westhuizen met with the defendant. The defendant took them on a test drive and on their return they stopped at a garage to closely inspect the motor vehicle. After the defendant confirmed to him and Van der Westhuizen that he was the owner of the motor vehicle, the plaintiff made an offer to purchase the motor vehicle and indicated that he had R94 000.00 in cash and was prepared to transfer the balance electronically. The defendant indicated to him and Van der Westhuizen that the transfer could be done at Kriel’s home since he had a Standard Bank account. On arrival at the Kriel’s home where they found him in the company of a woman, the defendant gave him a written contract to sign. I pause to point out that the written agreement of sale indicates the defendant as the seller and the plaintiff as buyer. He then gave the defendant the amount of R94 000.00 in cash and thereafter, whilst the defendant and the woman were counting the money, he and Kriel went to another room in the house where there was a computer in order to make an electronic transfer of the balance. After the transfer was made and they returned to the room where the others were, the defendant gave him a copy of his identity document to enable him to register the motor vehicle in his name. The motor vehicle was registered in his name on 10 June 2010. He had resold the motor vehicle to Motor vehicle King for R150 000.00. However, on 8 March 2011 he was informed by motor vehicle King that the motor vehicle had been confiscated by the police as motor vehicle was stolen. As a result he had to repay the R150 000.00 to Motor vehicle King.

8. Under cross examination, the defendant’s version put to the plaintiff was that he would

deny that he had told the plaintiff and Van der Westhuizen that he was the owner of the motor vehicle and that he never received the amount of R120 000.00 from the plaintiff. Further, that the defendant would testify to the fact that through the whole transaction he was acting as an agent of Kriel, working on commission.

9. The plaintiff called Van der Westhuizen. His testimony substantially corroborated the plaintiffs evidence. Under cross examination the following version of the defendant was put to Van der Westhuizen. That the defendant would testify that he had told the plaintiff at the garage that he could not complete the transaction on his own and it was necessary for them to go to Kriel in order to get the necessary papers. Van der Westhuizens' response was that the defendant had told them that the motor vehicle was his, registered in his name and was fully paid. Van der Westhuizen denied that the defendant had told them he was Kriel's agent and that Kriel was the actual owner.

10. The plaintiff closed its case.

11. The defendant testified as follows. He was employed by Kriel as an agent to sell motor vehicles working on commission. Kriel was responsible for placing advertisement in papers of motor vehicles on sale and he would include his contact details as he was his salesperson. He admitted to selling the motor vehicle to the plaintiff but denied that he did so in his capacity as owner of the motor vehicle since it belonged to Kriel. He denied that he signed the contract and stated that he had no agreement. He also denied that he was given any money by the plaintiff. His evidence is that the plaintiff gave the money to his sister who then started counting it and that the plaintiff had made a transfer of the balance into Kriel's account. He testified that Kriel and his sister did not allow him to receive any monies for the motor vehicles

he sold, hence he took the plaintiff and Van der Westhuizen to Kriel's house. He admitted that the motor vehicle was registered in his name but explained that it was only done so since he was the salesperson. He admitted that the plaintiff came to his house with Van der Westhuizen, took them for a test drive and later took them to Kriel's house. He testified that even though he was not the owner of the motor vehicle, the motor vehicle sold to the plaintiff was parked at his house as his sister and Kriel had security problems where they lived. He denied that Kriel had a Standard Bank account but an ABSA one. However he testified that he had a Standard Bank account.

12. Under cross examination the defendant reiterated that he was Kriel's agent. On being questioned about the sale agreement, he said Kriel had completed the agreement and had asked him to sign since he is the one who got the buyer. Although admitting to signing the contract he averred that he did so as Kriel's agent. The defendant also testified that he was unaware that the motor vehicle was stolen since he did not have any problems registering it when it was bought from the previous owner. He testified that he was still in possession of two of Kriel's motor vehicles but added that they were bought by his sister.

13. The defendant called Kriel to testify. He testified as follows. That he employed the defendant as a salesperson to sell motor vehicles he had bought for resale. That on the day in question the motor vehicle sold was parked at the defendant's house as he was the salesperson. The defendant and plaintiff came to his house. He took the plaintiff outside to inspect the motor vehicle. Contrary to the version put to the plaintiff that he had given the amount of R94 000.00 to him, Kriel testified that the plaintiff had given the cash amount to his wife who counted it and he had done an electronic transfer into his bank account held at FNB for the balance. He denied ever having a Standard Bank account. He testified that if

the defendant concluded a cash deal it was the arrangement that he would come to his house with the customer so that the money would be received by his wife for his benefit. He further testified that when the deal was concluded and the money handed over, he took the motor vehicle's papers and gave them to the plaintiff. He testified that he and the defendant had an arrangement that whenever he buys a motor vehicle for re-sale it would be registered in the defendant's name since he was the salesperson. He admitted that he completed the sale agreement and the plaintiff and the defendant signed as buyer and seller, respectively. He testified that plaintiff knew that he was the owner of the motor vehicle. He admitted that he was under sequestration since 2011 but denied evading the sheriff.

14. Under cross examination he confirmed that he had applied for the voluntary surrender of his estate and had deposed to founding affidavit thereto but could not explain why the plaintiff was not listed as one of his creditors since at the time the motor vehicle he sold to him had been confiscated by the police. He claimed that he had an oral agency agreement with the defendant. When questioned about his bank account he revealed that when he discussed the case with the defendant, after the defendant had testified, it was only then that he became aware that a Standard Bank account was in issue and not FNB, where he has an account. Contrary to the plaintiff and the defendant's evidence that the plaintiff had inspected the motor vehicle at a garage, Kriel reiterated that he had taken the plaintiff outside his house in order for the plaintiff to inspect the motor vehicle. He admitted that the defendant still worked for him although he denied that he owned any motor vehicles.

15. The plaintiff bears the onus of proving his claim. It is not in dispute that the plaintiff was sold the motor vehicle and that after making full payment the motor vehicle was delivered to him. By selling the motor vehicle to the plaintiff the seller gave a warranty that he was

transferring full ownership to the plaintiff. The issue in dispute is whether at the time the motor vehicle was sold to the plaintiff, the defendant or Kriel was the actual owner of the motor vehicle and therefore the actual seller of the motor vehicle. On this point the versions of the parties are mutually destructive in that the plaintiffs version is that the defendant had assured him that he was the owner of the motor vehicle. This was confirmed by the motor vehicle's documents given to him by the defendant and the identity document for purposes of registering the vehicle in his name.

Furthermore, the plaintiff had given part of the purchase price directly to the defendant and the balance indirectly through an electronic transfer into Kriel's account. The defendant's version is that he was not the owner of the motor vehicle but Kriel was. That the whole amount of the purchase price was given to Kriel and therefore the plaintiff could not seek recourse against him but Kriel.

16. In *National Employers' General Insurance Co Ltd v Jagers* 1984(4) SA 437 (E) the court stated at 440D -G:

"... that in any civil case, as in any criminal case, the onus can ordinarily be discharged by adducing credible evidence to support the case of the party on whom the onus rests. In a civil case the onus is obviously not as heavy as it is in a criminal case, but nevertheless where the onus rest on the plaintiff as in the present case, and where there are two mutually destructive stories, he can only succeed if he satisfies the Court on a preponderance of probabilities that his version is true and accurate and therefore acceptable, and that the other version advanced by the defendant is therefore false or mistaken and falls to be rejected. In deciding whether that evidence is true or not the Court will weigh up and test the plaintiffs allegations against the general probabilities. The estimate of the credibility of a witness will therefore be

inextricably bound up with a consideration of the probabilities of the case and, if the probabilities favour the plaintiff, the Court will accept his version as being probably true. If however the probabilities are evenly balanced in the sense that they do not favour the plaintiff's case more than they do the defendant's, the plaintiff can only succeed if the Court nevertheless believes him and is satisfied that his evidence is true and that the defendant's version is false."

17. The following facts are common cause:

17.1 the defendant negotiated the sale of the motor vehicle with the plaintiff after the motor vehicle was advertised with the defendant's contact details;

17.2 the defendant had taken the plaintiff and Van der Westhuizen on a test drive where after to Kriel's house.

17.3 At the time of the sale the motor vehicle was registered in the defendant's name.

17.4 the plaintiff has paid the full purchase price.

17.5 the defendant had given the plaintiff his identity document.

18. The plaintiff and Van der Westhuizen came across as credible witnesses when they testified about the events leading to the sale of the motor vehicle. They were credible witnesses. Van der Westhuizen's evidence was consistent with that of the plaintiff and no contradictions could be found even under cross examination. I was not impressed with Kriel as a witness. His evidence on some parts contradicted that of the defendant even though he disclosed that he had discussed the matter with the defendant after the defendant gave evidence. His evidence and that of the defendant were not satisfactory at all. The defendant could not give a reasonable and plausible explanation why, if the motor vehicle was owned by Kriel, it was registered in his name, was parked at his place, and his name appeared on the

advert as the seller of the motor vehicle. In his amended plea the defendant alleged agency. The onus rested on him to prove the agency. I am satisfied that the defendant has not satisfied the burden of proving that he was Kriel's agent and acted only as his agent.

19. I am satisfied that the plaintiffs version as to the events leading to him being sold the motor vehicle is more probable and I accept it and reject the defendant's version as highly improbable. Further, I am satisfied that the plaintiff has discharged the burden of proving his claim against the defendant on a balance of probabilities.

20. Accordingly the following order is made:

20.1 The defendant must pay the plaintiff the amount of R120 000.00;

20.2 The defendant is liable to pay interest on the amount mentioned in 20.1 at the rate of 15.5% per annum calculated from 11 March 2011 to date of final payment;

20.3 The defendant to pay the costs of this action.

NP MNGQIBISA-THUSI

Judge of the High Court