

IN THE KWAZULU-NATAL HIGH COURT, DURBAN
REPUBLIC OF SOUTH AFRICA

Case No: 2142/2009

In the matter between:

FIRST RAND BANK LIMITED t/a WESBANK

PLAINTIFF

and

DUAL DISCOUNT WHOLESALERS CC

DEFENDANT

JUDGMENT

Delivered on: 16 May 2013

MNGUNI J

[1] The plaintiff is an incorporated company with limited liability which, at all times material hereto and particularly during September 2007, operated as a bank and service provider having its principal place of business at 17th floor, Embassy Building, corner of Smith and Aliwal Streets, Durban.

[2] The defendant is a close corporation duly incorporated in terms of close corporation laws of the Republic of South Africa which, at all times material hereto and particularly during September 2007, carried on business as a dealership of motor vehicles under the name and style Esplanade Cars, having its principal place of business at 182 West Street, Durban.

[3] On 8 September 2007 the plaintiff and the defendant concluded a written master and representation agreement (main agreement) regulating,

from time to time, the terms on which all individual sale agreements relating to the goods which are entered into between the plaintiff (as purchaser) and the defendant (as seller) are concluded during its duration. The relevant clauses of the main agreement appear below:

'3. Purchase and Sale

3.1 The dealer will, on the terms and conditions set out herein, sell to the bank (in terms of individual sale agreement) such goods as may be selected by individual consumers from time to time, as confirmed by the bank or its representative in each instance, including:

- 3.1.1 motor vehicles, motor cycles, boats and other movable assets;
- 3.1.2 accessories to the aforementioned and/or the items as listed in section 102(1)(a) to (f) of the National Credit Act, where that applies;

....

3.3 Upon final confirmation by the bank or its representative as contemplated in 3.1 above, the dealer will in respect of each individual sale agreement, issue an invoice to the bank in respect of the goods concerned reflecting:

- 3.3.1 a full and accurate description of all goods sold in terms of the individual sale agreement concerned;
- 3.3.2 all serial numbers of the manufacture, Vehicle Identification Numbers (VIN) and other relevant identification numbers;

3.3.3 the purchase price of each item of the goods;

3.3.4 the deposit and/or initiation fee which the dealer receives on behalf of the bank, which deposit and/or initiation fee stands to be set off against the purchase price due by the bank to the dealer for the goods concerned in terms of 4 below;

3.3.5 the person to whom delivery is to be effected on the bank's behalf.

....

3.4 No portion of the purchase price will be deferred. The bank shall pay the full purchase price to the dealer without deduction or set-off (other than that contemplated in 4 below) in such manner as may be agreed between the parties from time to time.

3.5 The purchase price will not exceed the price normally charged by the dealer for products which are the same or substantially the same as the goods, in the ordinary course of business on the basis of a cash transaction.

....

6. WARRANTIES

6.1 The dealer warrants in favour of the bank that:

6.1.1 if the dealer is a juristic person, each signatory to this agreement is empowered by its memorandum and articles of association to enter into this agreement and that such signatory is duly authorised to execute this agreement for such juristic person;

6.1.2 the dealer will in each instance be entitled and able to give free and unencumbered title to the goods concerned to the bank on delivery and no person other than the bank, the dealer and the consumer has any right to such goods;

6.1.3 upon delivery of the goods in terms of the individual sale agreement concerned:

6.1.3.1 the goods will conform to the terms, description and specification set out in the relevant invoice;

....

7. INDEMNITY

7.1 Subject to 6.2 and 7.5, the dealer will indemnify the bank against actual losses, liabilities, damages and costs which the bank may reasonably suffer or incur as a result of or in connection with:

7.1.1 a breach of a warranty by the dealer, or

7.1.2 the negligent or wilful breach by an accredited person employed or appointed by the dealer of the terms of annexure A (save where such breach occurs by virtue of an instruction issued by the bank),

18. GENERAL

18.1 This agreement constitutes the sole record of the agreement between the parties in relation to the subject matter hereof. Neither party shall be bound by any express, tacit or implied term, representation, warranty, promise or the like not recorded herein. This agreement supersedes and replaces all prior commitments, undertakings or representations, whether oral or written, between the parties in respect of the subject matter hereof. All previous agreements between the parties are hereby cancelled by agreement.

18.2 No addition to, variation, novation or agreed cancellation of any provision of this agreement shall be binding upon the parties unless reduced to writing and signed by or on behalf of the parties.

....'

[4] On 14 or 18 February 2008 at Durban, the parties concluded a partly written and partly oral agreement (the ancillary agreement) in terms of which the defendant sold a Mercedes Benz motor vehicle (vehicle) to the plaintiff. In concluding the agreement the plaintiff was represented by a duly authorised employee and the defendant by Bob Singh (Singh).

[5] Pursuant thereto, the defendant generated and submitted annexure "B" to the plaintiff in compliance with clause 3.3 of the main agreement and the plaintiff duly paid the purchase price. Annexure "B" gives the vehicle's details, a stock number, registration number TBA, the date on which the vehicle was sold, which is 14 February 2008. Under the date of sale, there is a model designation, which is model SL 55 AMG and the make of the vehicle is

reflected as, Mercedes Benz with engine number 11399160019174 and chassis number WDB220074243895248. The colour is reflected as silver and the year of registration is 2003. There is reference to M&M code which is an abbreviation of Mead and McGrouther, also called the Auto Dealer's Guide for purposes of vehicle valuations. The price for which the vehicle was sold is reflected as R922 427. Under miscellaneous item, the defendant added licence and registration fees before deducting the deposit of R100 000 paid by the customer. The overall amount due and payable by the plaintiff was R823 427 which the defendant presented to the plaintiff, represented the selling price for a model SL vehicle. The customer took the delivery of the vehicle and the plaintiff duly paid the purchase price.

[6] The procedure agreed between the parties was that a potential customer would approach the dealership, identify a particular vehicle that he was interested in buying. The potential customer would thereafter approach the finance and insurance manager (manager) who was usually resident on the floor at the dealership. The manager would then take down the application and fax it through to the plaintiff together with an offer to purchase. The images of the application would then be displayed on the plaintiff's systems. The plaintiff would then consider the application, verify the truthfulness and correctness of that information and assess the credit worthiness of the potential customer. Upon receipt of all answers to the questions that the plaintiff had asked from the dealership and after satisfying itself about the credit worthiness of the potential customer, the plaintiff would fax back the approval to the dealership and the dealership would in turn fax to the plaintiff

an invoice from which the plaintiff would draw up the actual contract. The plaintiff would then send the contract back to the dealership, which would then collect all the necessary documentation signed by the potential customer. The dealership would then provide the plaintiff with the required fee and other relevant information to pay the dealership out of the transaction. It is not customary for the plaintiff's officials to have sight of the vehicle. The plaintiff would load the information given to it by the dealership through the offer to purchase or application into its system.

[7] On 18 February 2008 the customer signed the delivery receipt and took the delivery of the vehicle. The delivery receipt appears at page 57 of bundle "A" and gives the description of the vehicle delivered to the customer as the Mercedes Benz SL 55 AMG with engine number 11399160019174 and chassis number WDB2200742A385246.

[8] The detailed statement which appears on page 109 of bundle "A", showing the history of the transaction reveals that the customer paid only two instalments. Thereafter the subsequent debit orders were not met and that resulted in the plaintiff instituting action against the customer. Eventually, the sale agreement was cancelled and the plaintiff repossessed the vehicle. The plaintiff instructed the valuator to value the vehicle and during this process, the plaintiff discovered that the vehicle it financed was the model reflected on annexure "B" instead the one being valued was an S model. It is against the background of this synopsis of facts that on 10 February 2009 the plaintiff

instituted the present action against the defendant alleging that the defendant breached the main and ancillary agreements, in that it:

- '(a) delivered a Mercedes Benz S55AMG;
- (b) failed to deliver a Mercedes Benz SL55AMG;
- (c) charged a price which exceeded the price normally charged for such vehicle by R578 827.00;
- (d) delivered a vehicle which did not confirm with the description and specification in the invoice.'

In the alternative, the plaintiff instituted a delictual claim based on a fraudulent misrepresentation.

[9] In its plea, the defendant denied the plaintiff's assertions. In amplification of the denial, it averred that on 14 February 2008, the parties concluded an oral agreement in terms of which the defendant sold, and the plaintiff purchased a Mercedes Benz motor vehicle selected by the plaintiff's client, to whom the vehicle was in turn sold by the defendant on an instalment sale basis.

[10] At the commencement of the trial, I ruled that the issue of liability be first adjudicated upon and I deferred the issue of the quantum of the claim for later determination. Counsel also handed up three bundles of documents which were marked, respectively, "A", "B" and "C". One witness testified for each party, namely, Julie Anne Middleton (Operations Manager for KZN) for the plaintiff and Bob Singh for the defendant (General Manager (Umhlanga)) at that time.

[11] Mrs Middleton testified that she is in charge of the staff that receives processes and validates the applications from the dealerships. The staff would also enter into contracts on the approved applications on behalf of the plaintiff. They would then pay out on those particular deals once all the necessary documentation from the dealership is received. Marius van der Merwe of Wesbank Fraud Section requested her to investigate this particular deal.

[12] It is important for the plaintiff to know the model of the vehicle that it is financing because the model determines the value in terms of what its trade in value is. This enables the plaintiff to determine whether it has enough equity in the goods that it is financing. It is also important for the plaintiff to know the manufacturer because it has to know what type of the vehicle it is financing. The vehicle, SL 55 AMG with M&M code 44084120 was presented by the defendant to the plaintiff as having a retail value of about R920 000 in the M&M book. The plaintiff's financing policy dictates that the financed amount should be in keeping with the value of the vehicle.

[13] In exceptional circumstances, the plaintiff would do a pre-approval for a particular vehicle but even in this instance, the approved dealership is required to have the vehicle on stock, put the vehicle through Certificate of Roadworthiness, and to make sure that the description of the vehicle correctly reflects the vehicle which the plaintiff has approved. The contract must reflect the goods that the dealership has on its floor and the plaintiff has a separate

section which deals with the deals involving the financing of the private sales. The main agreement does not form part of that section.

[14] In instances where the code is not listed in the M&M book, the plaintiff will, instead of using the code reflected on annexure "B" use the code 88888888 which will automatically default on the plaintiff's systems to what is called a non score deal and the deal will then be processed through the Head Office Credit. The Head Office Credit, will then request her section to conduct further investigation and obtain the deemed market value of the vehicle. This will require on her part to contact the Mercedes Benz South Africa and/or one of the other franchise dealers, and/or the Mercedes Benz outlets to get an approximate value of the vehicle. The information obtained pursuant to this investigation will then be used to ascertain the fair trade in value and retail price of the vehicle. When she was asked to investigate this deal, she found that the aforementioned procedure was not followed.

[15] Although the defendant had played its cards quite close to its chest, during her cross examination, the kernel of its defence started to emerge. The following was put to her. Singh was employed by the defendant at the time when the transaction was concluded. He was the person who dealt with this transaction. Singh was advised that the finance for this particular vehicle had been pre-approved by Mr Andrè Reddy of the plaintiff. Singh was told that the transaction needed to be processed through the accredited dealership. As the defendant was one of the accredited dealerships, it processed the transaction. There was no M&M code available on the book for SL 55 AMG and Reddy

told Singh that in order to process this particular transaction, he should use the M&M code number appearing on annexure "B". He therefore processed the transaction on Reddy's instruction using the said code.

[16] Singh testified that in February 2008 he was approached by Sean Naidoo who was a broker. Naidoo told him that the plaintiff had pre-approved finance for him to purchase an S 55 AMG vehicle but the bank could not finance a private sale. Singh had not sold an S 55 AMG before this transaction. Naidoo told him that the contact person at the plaintiff's institution was André Reddy and gave him Reddy's contact number which started with numbers 086. Indeed, he contacted Reddy and asked him to send the details to him. Reddy confirmed to him that the plaintiff had already approved the deal. He advised Reddy that the vehicle which was the subject of the transaction was an S 55 AMG model not an SL 55 AMG model. Despite that, Reddy told him to process the vehicle as an SL 55 AMG model. He also told him that the M&M book did not have a code for the SL 55 AMG. Reddy gave him the code reflected on annexure "B" and told him to process the transaction using the said code, which he did. On receipt of payment from the plaintiff, the defendant settled the amount owed to seller's bank, kept an amount of R20 000 for its fees and the balance was paid to Naidoo as his commission. Towards the end of March 2008 Mr Lass, the employee of the plaintiff approached him to find out whether he dealt with Reddy. He confirmed to Mr Lass that he dealt with Reddy on this transaction and he further told him what Reddy had said about the deal. He told Lass that S 55 AMG and not SL 55 AMG was the vehicle which was the subject of the

transaction and Reddy was aware of that. He had given the description reflected on annexure “B” on Reddy’s instruction.

[17] Under cross examination he testified that he worked as a Motor Sales Manager for the defendant for 18 years and was familiar with the Auto Dealers Guide which gives the suggested trade in and resale values of the motor vehicles. He conceded that S and SL are totally different models with a different M&M codes. He regarded the difference between the two models as important and that is the reason why he decided to disclose to Reddy that the model which was a subject of the transaction was not an SL 55 AMG. He conceded that because of this transaction, the plaintiff paid R823 000. The defendant paid approximately R500 000 to Naidoo as his commission because he found the vehicle, the buyer and was instrumental in obtaining the finance approval for the deal. Although in his evidence in chief he had testified that it was his first time dealing with Naidoo when he consulted him on this transaction, it however transpired, when he was referred to page 42 of bundle “A”, that his earlier evidence in that regard was not true. He denied that he processed the transaction knowing that it was a fraudulent transaction.

[18] It is common cause that the description of the vehicle given on annexure “B” is a Mercedes Benz SL 55 AMG with engine and chassis numbers 11399160019174 and WDB22007424386246 respectively. The evidence reveals that Singh of the defendant made out annexure “B” to the plaintiff. The perusal and consideration of p125 of bundle “A” demonstrates that Anthony John Kleve sold S 55 AMG for R352 000. Singh conceded that

the two vehicle models are totally different from each other in appearance and in price.

[19] The plaintiff paid R823 427 to the defendant for the transaction. Singh's evidence was that the defendant's benefit in the transaction was limited to R20 000. After paying the amount due to the seller's bank, the balance of the money was paid to Naidoo. As the plaintiff's case is founded on contract, and it is, therefore, not necessary for the Court to make a finding on who benefited from the transaction.

[20] The evidence revealed further that the customer failed to meet his monthly repayments resulting in the plaintiff instituting action against him which culminated in the repossession of the vehicle and its sale in execution for R237 120. Having regard to the totality of evidence, I am satisfied that the defendant breached clause 3 and 6 of the main agreement. The goods delivered to the customer did not conform to the terms, description and specification set out in the relevant invoice. In terms of clause 7 of the main agreement, the defendant undertook to indemnify the plaintiff against actual losses, liabilities, damages and costs which the plaintiff may reasonably suffer or incur as a result of or in connection with a breach of warranty.

[21] Singh's evidence was that he was aware that the vehicle which was the subject of the transaction was an S 55 AMG model and not SL 55 AMG as written on annexure "B". His evidence was that he was instructed by Reddy to write down that description and to use the M&M code appearing thereon. I

have carefully considered this evidence and, in my view, it falls foul of clause 18 of the main agreement. The validity and binding nature of clauses such as this was reaffirmed by Harms JA in *Brisley v Drotsky* 2002 (4) SA 1 SCA at 11C – F as follows:

Partye doen dit deur vooraf ooreen te kom dat 'n kontrak alleen dan tot stand kom wanneer aan sekere formaliteite voldoen is. Die oogmerk is om geskille te beperk of uit te skakel. Natuurlik staan dit partye vry om die formaliteite te ignoreer en te handel asof 'n bepaalde Wet nie bestaan nie. Ontsaan 'n dispuut, is enigeen geregtig – en die Hof verplig – om die strikte reg toe te pas. En hoekom moet dit anders wees in vrye kontrakverband? Daar is ook 'n algemeen heersende mite dat hierdie tipe bepaling stegs ten bate van die ekonomies magtige bestaan en dat die tot ongelykheid in kontrakverband aanleiding gee. Dit is waarskynlik waarom daar 'n beroep op die grondwetlike gelykheidsbeginsel gemaak word. Hierdie bepaling dien ter beskerming van beide partye. Mens kan maar net wonder hoe die huurder sou gereageer het as die verhuurder sou beweer het dat daar mondeling op 'n verhoogde huurgeld ooreengekom is.'

I am unable to find any evidence that the parties agreed or even applied their minds to the question of deleting this clause. It accordingly remains of force and effect. I am further satisfied that because of the defendant's breach aforesaid, the plaintiff has suffered or incurred damages in connection with the said breach. In *Novick v Benjamin* 1972 (2) SA 842 (A) Trolip JA held:

'A fundamental principle of our law is that for a breach of contract the sufferer should be placed by an award of damages in the same position as he would have occupied had the contract been performed, so far as that can be done by the payment of money, provided (a) that the sufferer is obliged to mitigate his loss or damage as far as he reasonably can, and (b) that parties, when contracting, contemplated (actually or presumptively) that that loss or damage would probably result from such a breach

of contract (see *Victoria Falls & Transvaal Power Co. Ltd. v Consolidated Langlaagte Mines, Ltd.*, 1915 AD 1 at p. 22; *Lavery & Co. Ltd. v Jungheinrich* 1931 AD 156).'

In the result, I make the following order.

Order

- (a) The defendant is liable to pay to the plaintiff such damages as the plaintiff may prove to have suffered or incurred consequent to the breach of the warranty
- (b) The defendant is directed to pay costs on the issue of liability.

Mnguni J

Appearances /..

Appearances:

For the Plaintiff : Adv. A.V. Voormollen

Instructed by : Easton-Berry Inc.
Durban

For the Defendant : Adv. A. D. Collingwood

Instructed by : Johnston & Partners
Durban

Date of Hearing : 03 May 2012

**Date of
Filing of Judgment** : 16 May 2013