

IN THE HIGH COURT OF SOUTH AFRICA

(NORTH GAUTENG, PRETORIA)

DATE: 11 DECEMBER 2009

CASE NO: 25939/2005

In the matter between:

**DAIMLERCHRYSLER SERVICES
SOUTH AFRICA (PTY) LTD
And
RAPHAKANE DAVID MABOGOANE**

Plaintiff

Defendant

JUDGMENT

[1] The plaintiff is claiming from the defendant damages amounting to R 245 018. 49 arising out of a written Finance Lease Agreement no. 136090 (the contract) consisting of two pages.

[2] The contract, inter alia, states that the plaintiff should be entitled to recover from the defendant all costs, expenses and disbursements incurred resulting from any breach of the contract by the defendant, including all the legal costs on an attorney and client scale (see clause 7.3 on page 4 of exhibit A.

[3] In the pre-trial minutes the defendant admitted that

3.1 Plaintiff was at all material times the owner of a Mercedes-Benz [.....] motor vehicle with registration number [.....] engine number 6489 6030000775 and chasis number WDB2200252A319102 (the vehicle),

3.2 he signed the contract.

3.3 the terms of the contract are as set out in the contract.

3.4 The amount of damages suffered by the plaintiff is R245 018, 49.

[4] Despite the admissions by the defendant in paragraph 4 of his plea defendant denied that the parties concluded the contract and specifically denies that there was any consensus to enter into the contract with the plaintiff for the financing of the vehicle. During the trial the defendant did not amend the plea nor make an application to amend same.

[5] The plaintiff called two witnesses viz Mr. H. G. Venter and Ms. Belinda Ferreira and closed its case The defendant testified and closed his case too. Exhibit A. D and C were handed to the court by agreement.

[6] In the light of the admission made by the defendant I will, in scrutinising the evidence, only refer to certain aspects of the evidence which I consider important for the purpose of this judgment

[7] Mr. Venter testified that because of the lapse of time he could not specifically remember the specific occasion when the defendant signed the contract. However, he recognised and identified his signatures and/or initials in the contract and in some of the documents in exhibit a He said, acting in his representative capacity, he signed and initialled the contract as a witness of the plaintiff to the defendant's signature and initials. He also confirmed that the plaintiffs, lessor's, representative's electronical signature together with the electronic witness's signature on the contract being valid and an acceptable signature and initial of the plaintiffs representative.

[8] Mr. Venter further confirmed that the signature or initials of the witness appended on pages 5. 6. 7. 8. 9. 10 and 11 were his He explained in detail the procedure and process when a customer applied for finance to purchase a vehicle. He also said when he dealt with his customer he habitually made it a practice to make the lessees or buyers to sign the contract next to the narration describing the vehicle, the extra charges, finance details, and the period and the instalments of the vehicle as it appeared on page 3 of exhibit A.

[9] He categorically stated that when he signed as a witness the person on whose behalf he/she signed as a witness had to be present, he would also make the copy of identity of the person for identification purposes and would explain to the contents of the documents signed to the customer.

[10] Under cross-examination he denied defendant's version put to him that the defendant signed the document in the presence of the salesperson Mr. Xayne Toweel whose name appears at the bottom of page 38 of exhibit A

[11] He further challenged and disputed the defendant's version that when he, the defendant, signed the agreement he thought he was signing on somebody's behalf by stating that if he (the defendant), thought he signed on somebody's behalf why would the contract reflect in his name.

[12] The defendant testified that he is a businessman who once had a lease with a Shell Petroleum Company (Shell) and he operated one of its filling stations. He said he had a problem with Shell and he instructed an attorney, Mr Anton Killian, who had offices to the garage to assist him and he paid a fee of R 2000 to Mr. Killian.

[13] During a consultation Mr. Killian informed him that he knew a coal mining company, viz, Tswelopele Holdings that was looking for a credit worthy black partner. If he, the defendant, could join the said company. Tswelopele Holdings and pay a joining fee R 53 200 he would benefit millions of rands and his financial problems would be solved. The defendant further said he paid the R 53 200 into Mr. Killian's trust account and Killian introduced him to one. Mr Boshoff. He gave Boshoff a copy of his identity document, his bank statements for six months and proof of residence Thereafter he struggled to have a meeting with Mr. Boshoff until he met him at Bapsfontein at a mine in Witbank which he was told was operated by Tswelopele Holdings

[14] Thereafter Killian later arranged for another meeting at Midrand for him to sign for vehicles where he met Mr Boshoff and they went to Grand Central Motors on a Saturday the 6th March 2004 where they met Mr. Toweel, the salesperson.

[15] The defendant testified that Mr. Boshoff told him that he should sign some document on behalf of Tswelepele Holdings which was buying vehicles for its director. He said he just signed without reading the said documents at the sections where Mr. Toweel indicated. When he signed he was informed that the transaction was for buying vehicles. Thereafter Mr Boshoff should show him two Mercedes-Benz vehicles that he signed for.

[16] The defendant emphasised that he did not take delivery of the vehicle and he. never drove it. He further said the plaintiffs tracer, one Mr Naude approached him in about end of February/beginning of March 2005 and wanted to repossess the vehicle. He told him to enquire about the vehicle from Mr. Killian. I interpose to mention that the defendant did not give reasons why did he refer Mr. Naude to Mr. Killian and not to Tswelepele Holdings office in Menlyn He further said the next day Mr. Naude visited him again and showed him the repossessed the vehicle He was now seeing the vehicle for the second time, the first time being when he saw it at Grand Central Motors when he signed the documents Mr. Naude advised him to report the matter to the SAPS if he was unduly influenced or defrauded when he signed the papers of the vehicle.

[17] Of importance, the defendant further acknowledged that he did receive letters from the plaintiff regarding the arrears however, he took all the letters to Mr. Killian Since the letters were addressed to him, I assume that he read the contents thereof and he should have noticed that the plaintiff has written to with him in his personal capacity

[18] Regarding the signatures, the defendant admitted that he signed the first page of the agreement at six different parts on its first page, see exhibit A page 3. However, he denied that he initialled the second page of the agreement. The defendant further stated that he always signed in full and never uses initials He therefore, denied the initials that Mr Venter said they were made by him on pages 4. 8 and 11 of exhibit A.

[19] I interpose again and comment about the defendant's version that he uses his full signature and not initials. In exhibit B pages 61 62 and 63 are pages of an Instalment Sale Agreement that the defendant acknowledged he signed on 23rd December 2002 when he purchased a Mercedes E270 CDI Elegance which was financed by the plaintiff.

[20] It is clear from the said documents that there are certain parts which have been initialled, the said initials, especially when compared with initials on page 8 of exhibit A, have some resemblance. Furthermore, in exhibit C the defendant's affidavit to support an application for the rescission of judgment, the defendant initialled the pages of the affidavit that he was prepared by his attorneys. The defendant's allegation that he does not initial is in my view, a smokescreen trying to hide the truth.

[21] The defendant in his evidence further said that he is north-sotho speaking, he can read and write afrikaans and cannot read english well and has a problem in writing english. However, in court when the defendant was requested to read certain paragraphs in the exhibits which were written in English he read them fluently.

[22] Importantly, the defendant in his evidence in chief said when he put his signatures on page 11 of exhibit A the hand written post box address was on the document, however, when Mr Venter was cross-examined it was put to him by the defendant's counsel that the hand written address did not exist.

[23] On careful analysis of the defendant's evidence, it is not disputed that the defendant knew that he was signing a Finance Lease Agreement relating to a vehicle. However, he alleged that he thought the lessee or purchaser was Tswelopele Holdings.

[24] Despite the fact that he thought the lessee was Tswelopele Holdings the defendant after about eight months received letters from the plaintiff addressed to him personally regarding the arrears on the vehicle. In my view he should have realised that he was personally involved in the contract with the plaintiff. The defendant's conduct after he signed the contract does not tally with that of a person who did not know that he signed the contract to bind himself personally.

[25] The defendant further said he reported the matter to the police some few weeks after the vehicle was repossessed. Having regard to the contents of a letter from the plaintiff to the defendant dated 7th March 2005, the vehicle was repossessed in about February-March 2005. He also said that he made a follow up to the police where the

docket was open in the same year meaning 2005. However, the docket number is Benoni cas 197/3/2006 which implies that the docket was opened in March 2006.

[26] If the defendant was put in such a mess by Mr. Boshoffs conduct and also after paying a deposit of R 53 200, I fail to understand why would he delay in laying a criminal charge Crucially, he should have told the attorney he instructed after receiving summons to seek an explanation about Tswelopele Holdings and the joining fees that he paid from Mr. Killian. The defendant did not give evidence explaining what he in the meantime did to claim the joining fees.

[27] The plaintiff's witnesses were in my view, reliable, credible and honest witnesses. On the contrary same cannot be said about the defendant. As indicated above he did not give a full and satisfactory account about his dealings with Mr. Killian and Mr. Boshoff He also failed to call Mr. Killian as a witness.

[28] The defence raised by the defendant in his evidence in court is that he made a iustus error. For such a defence to succeed the court is to apply an objective test.

[29] Furthermore, the error would have to be reasonable (iustus) and should be pleaded, see National & Overseas Distributors Corporation (Pty) Ltd v Potato Board 1958 (2) SA 473 (A) In my view, the alleged error or mistake by the defendant is not reasonable having regard to the evidence in totality and his defence was not pleaded.

[30] In terms of the contract the defendant agreed to pay costs on an attorney and client scale. I am also of the view that a special order of costs would be appropriate since there was no merit in the defendant's defence.

[31] I therefore, make the following order:

- (i) The defendant is liable to pay the plaintiff the amount of R 245 018, 49 plus interest from the 22 June 2005 to date of payment.

- (ii) The defendant is ordered to pay the costs on an attorney and client scale.

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A. P. LEDWABA

JUDGE OF THE HIGH COURT