CASE NO (P). I 698/2009

IN THE HIGH COURT OF NAMIBIA

In the matter between:

LEBBEUS SHITULEIPO MBEKELE **PLAINTIFF**

And

STANDARD BANK NAMIBIA LTD
VEHICLE & ASSET FINANCE **DEFENDANT**

CORAM: **UEITELE, AJ**

Heard on: 06- 09 July 2010; 02, & 03, August 2010; 06 -09 September 2010

Delivered on: 25 January 2011

JUDGMENT

UEITELE, AJ.: [1] The plaintiff instituted action against the defendant in which action the plaintiff claims cancellation of contract and restitution of the purchase price which was paid by way of a deposit of N$30 000-00 (Thirty Thousand Namibia Dollars) and fifty three monthly instalments of N$3 159-13 (Three Thousand One Hundred and Fifty Nine Namibia Dollars and Thirteen Cents).

A THE PLEADINGS

[2] In the particulars of claim the plaintiff amongst others made the following allegations:

(a) On the 03rd day of March 2006 he entered into a written instalment sale agreement with the defendant in terms of which he purchased a 2002 Audi A4 vehicle from the Defendant for the sum of N$ 170 593-02. A copy of the instalment sale agreement was attached to the particulars of claim.

(b) The contract was entered into on the common assumption that the motor vehicle that was sold by the defendant was a 2002 Audi A4 second hand motor vehicle.

(c) The motor vehicle is not what was assumed by the parties but is in fact a 2002 Audi A4 rebuild model.

(d) There is a material difference between the market value of a 2002 Audi A4 second hand motor vehicle and a 2002 Audi A4 rebuild model of approximately N$50 000-00.

(e) Had he known that the 2002 Audi A4 vehicle was a rebuild, he would not have bought the vehicle from the defendant nor would he have paid the purchase price of N$150 000-00 for that vehicle.

(f) The agreement is accordingly void as a result of the common mistake between the parties when they entered into the agreement.

[3] During the cause of the hearing the plaintiff applied to amend the particulars of claim in respect of the allegations of common mistake. I granted the application, giving the defendant the opportunity to also plead to the amended particulars. The amended particulars of claim introduced an alternative cause of action and plaintiff amongst others alleges (in the amended particulars of claim) the following:

(a) On or about the 03 March 2006 the Defendant represented to the plaintiff that the plaintiff was purchasing a second hand 2002 Audi A4 model motor vehicle from the Defendant.

(b) The defendant knew that the plaintiff would act on the representation that the motor vehicle in question is a second hand motor vehicle and owed a duty of care towards the plaintiff to provide the correct information regarding the status of the motor vehicle, to the plaintiff.

(c) The status of the motor vehicle was material to the agreement and was made with the intention of inducing plaintiff to act thereon.

(d) Plaintiff relying on the truth thereof purchased the motor vehicle from the defendant.

(e) The representation by the defendant that the motor vehicle was a second hand motor vehicle was false as the motor vehicle was in fact a build up or rebuild motor vehicle.

(f) The defendant acted with intent alternatively negligently in failing to disclose to the Plaintiff that the vehicle was a rebuild vehicle, because it did not discharge its duty of care towards the plaintiff by alerting him to the status of the vehicle as being rebuild.

(g) As a consequence of defendant's misrepresentation, the plaintiff entered into a written instalment sale agreement with the defendant which the plaintiff would not have done, had he known that the vehicle was a rebuild.

(h) The defendant's misrepresentation precluded consensus between the parties regarding the subject matter of the sale, and as a result the plaintiff cancelled the sale on 24 July 2008 and tendered return of the 2002 Audi A4 model vehicle against payment of all monies paid by the plaintiff pursuant to the written instalment sale agreement concluded between the parties.

[4] The defendant pleaded that the plaintiff initially negotiated and concluded a sales transaction with a certain Dr. Naanda in a private transaction relating to the purchase of the said 2002 Audi A4, which preceded the written instalment sale agreement. The defendant further denied that it was mistaken as to what it sold to the plaintiff. I will set out (incorporating the amended plea) some of the allegations in the defendant's plea:

(a) In the amended plea, the defendant raised a point *in limine*, namely that the instalment sale agreement was preceded by private negotiations between the plaintiff and a certain Dr Naanda, and that the said Dr Naanda has a substantial interest in the proceedings and ought to have been joined and the failure by the plaintiff to join Dr Naanda is fatal. The defendant, at the hearing of this matter abandoned this preliminary objection.

(b) The transaction relating to the sale of the vehicle including its terms as to its model, make and condition was negotiated and agreed upon between the plaintiff and the said Dr Naanda without any involvement whatsoever by the defendant. Defendant avers that it merely acted as a financier of the transaction.

(c) That upon receipt of the registration documentation from the plaintiff himself and/or the previous owner of the vehicle with whom the plaintiff initially secured the vehicle prior to applying for finance from the defendant, the defendant alerted the plaintiff to the fact that the documentation received via fax reflected that the vehicle was a rebuilt.

(d) The defendant did not negotiate and/or agree with the plaintiff regarding the type and/or model of the vehicle to be sold as such terms were concluded between the plaintiff and Dr. A.N. Naanda, the previous owner of the vehicle.

(e) The defendant did not have any obligation to disclose the status of the vehicle.

(f) The plaintiff had possession of the registration documents of the vehicle prior to and pursuant to the conclusion of the instalments sales agreement as such the plaintiff knew from the outset what the status of the vehicle is. .

[5] Having briefly surveyed the pleadings I will now turn to the evidence that was placed before me. But before I summarise the evidence I will briefly set out the issue that I am called upon to decide.

[6] In my view the issue for determination before me is whether the instalment sales agreement concluded between the plaintiff and the defendant is voidable on the basis that consent between the parties is vitiated either by mistake or by misrepresentation.

B THE EVIDENCE

[7] The plaintiff testified in his own case and also called a certain Mr. Haimbili to testify on his behalf. The defendant also called two witnesses, a certain Ms. Madjiedt and a certain Mr. Conradie. I will, below, set out the salient aspects of each witnesses' testimony.

Mr. Elia Hamibili

[8] Mr. Haimbili testified that:

(a) He knew the plaintiff from childhood and on a day that he cannot remember, but in July 2008, he had a discussion with the plaintiff regarding the sale of the plaintiff's vehicle. They spoke, until they

arrived at a purchase price of N$120 000-00 (One Hundred and Twenty Thousand Namibia Dollars).

(b) Once the purchase price was agreed upon, he approached the defendant's Rundu Branch and applied for a loan for the financing of the vehicle that he wanted to buy.

(c) When he applied for the loan he was asked to provide the defendant's Rundu Branch with all the details of the vehicle that he wanted to buy (i.e. the make, model, price and registration papers of the vehicle).

(d) He was informed that it will take approximately three days for him to be informed of the status of his application. He was however informed a week later that his application for financing was approved, but he cannot buy the vehicle that he wanted to buy, because that vehicle was a rebuild. He was asked to give another quotation for another car.

(e) After he was informed by the defendant that he cannot purchase the vehicle in question (i.e. the 2002 Audi A4) he went outside the bank and called the plaintiff and informed the plaintiff that the bank (defendant) said he cannot buy the vehicle anymore because the vehicle is a rebuild.

(f) When he told the plaintiff that the bank said it could not finance the vehicle because it was a rebuild, the plaintiff sounded very surprised. Plaintiff then asked him to go back to the bank and asked them whether they could put the reason for not wanting to finance the vehicle in writing. He went back and the person he was dealing with wrote him a letter which states as follows:

"To whom it may concern

Mr. E. Haimbili has recently applied for finance to purchase an Audi A4 2002 from Mr. S.M. Lebbeus. Unfortunately we are not able to assist him as the car has been built up."

This letter was handed up and marked as Exhibit "A".

Mr. Lebbeus Shituleipo Mbekele

[9] Mr. Mbekele, (the plaintiff) testified as follows:

(a) During January or February 2006, he saw the vehicle (i.e. the 2002 Audi A4) being driven by a certain Ms. Naanda and on it was displaced a paper stated "For Sale".

(b) That Audi was always his dream car, and he had just finished paying off his Jetta with First National Bank, so he wanted to buy another car. He made contact with Dr. Nanda, they talked. He had a physical inspection of the vehicle and it struck him that the vehicle was "very, very well looked after... The engine was excellent and the mileage was on 55 000 km". He also asked whether the car was involved in accident and Dr. Nanda said "no the car was never involved in a motor vehicle accident". He then informed the said Dr. Naanda that he was interested in the vehicle and that he will make contact with his bank and revert to her. They also agreed that the purchase price was N$150 000-00 (One Hundred and Fifty Thousand Namibia Dollars).

(c) That since he did not have the N$150 000-00 (One Hundred and Fifty Thousand Namibia Dollars) he sought financial assistance from the defendant. He went to the defendant and there made contact with Ms. Madjiedt, who informed him that he must submit his payslip, copy of identification document in order for the defendant to determine whether

he could afford the instalments. He said after he handed in all those documents, Ms. Madjiedt called him and told him that he qualified to purchase the vehicle.

(d) He was never asked to submit any documentation relating to the registration or ownership of the car, he also testified that he never saw the registration documents of the vehicle.

(e) After he was informed that he qualified to purchase the vehicle he completed an application form for financing. He was later informed that his application was successful. He testified that he was called to the office of Ms. Madjiedt, papers were put in front of him, he was told that this is the instalment sale agreement “sign here, sign here, sign there”. He was required to pay a deposit and he paid a deposit of N$30 000-00 (Thirty Thousand Namibian Dollars).

(f) After he signed the agreement on 03 March 2006, he was given a paper to take to Autohaus, he took the paper to Autohaus to a certain Ms. Betty Labuschagne. After he handed the document to Ms. Labuschagne, he was given the keys to the vehicle.

(g) That Autohaus (Audi) attended to the whole process of registering the vehicle, he did nothing with regard to the registration of the vehicle. He said that when he collected the vehicle he was handed the service book together with the registration papers which were folded. He checked and he saw his name and he was very happy and he drove straight to his mother’s house because in his tradition “when you buy a car you must take it to the living parent”.

(h) He was always looking for a well looked after second hand vehicle, so if he knew that the car that he was buying was a rebuild he would never have bought it.

(i) In July 2008, Mr. Haimbili approached him and informed him that he is interested in buying the vehicle. They negotiated with Mr. Haimbili until they reached an agreement that he would sell the car to Mr. Haimbili for N$120 000-00. Mr. Haimbili then undertook to approach a bank and apply for vehicle financing. Mr. Haimbili later phoned him and advised him that the bank said he qualified to purchase a vehicle for an amount of N$120 000-00. He thereafter gave all the ownership papers to Mr. Haimbili for him to take to the bank.

(j) Mr. Haimbili called him from Rundu, and informed him that he was experiencing delays with his application so he (Mr. Haimbili) asked plaintiff whether plaintiff could go and follow up. Plaintiff then went to Ms. Madjiedt and informed her that he has a sales deal with someone in Rundu but there are delays. In his presence Ms. Madjiedt called the person in Rundu and thereafter she said to plaintiff that there is one document that is still outstanding, namely the vehicle inspection report, so they sent the plaintiff to Prosperita for somebody there to inspect the vehicle. The inspection was done and after he paid the amount of N$170-00 (One Hundred and Seventy Namibia Dollars) he was given the inspection report which he took to Ms. Madjiedt.

(k) The next thing that he got was a call from Mr. Haimbili asking him why he (plaintiff) wants to sell him (Mr. Haimbili) a ‘scrap’. Mr. Haimbili said the bank cannot buy that vehicle (i.e. the 2002 Audi A4) because it was a build up. He then asked Mr. Haimbili to get the written confirmation

from the bank and that is how Exhibit "A" was prepared and exhibit "A" was then faxed to him. After he received that information he was shocked and he then started his investigation.

(l) He went through the service book of the vehicle. The service book revealed that the vehicle was registered for the first time in 2002 and it was deregistered in 2003, for the whole of 2004 the vehicle was never serviced and it was again serviced in 2005. Plaintiff only came to know for the first time that the car was a rebuild when he received the call from Mr. Haimbili.

(m) That after his discovery he went to Murorua & Associates and instructed that law firm to inform defendant that he is cancelling the instalment sale agreement, and claiming restitution of the purchase price. The letter of demand was copied to Autohaus who was the delivery agent.

(n) Both Autohaus and the defendant replied to the letter of demand. Autohaus' reply was to the following effect:

> "The vehicle mentioned in the letter belonged to a customer of Audi Centre Windhoek, Dr. A.N. Naanda. The only part that Audi centre played in the transaction was to provide our client, Dr. Naanda, an administrative service solely pertaining to the licensing and Police clearance of the mentioned vehicle. According to the invoice supplied to Autohaus (Pty) Ltd from Standard Bank for transaction between Standard Bank and Mr. L.S. Mbekele the interpretation is that it was a private transaction. Please find the proof of the invoicing between Standard Bank, Dr. Naanda and you client, Mr. Mbekele for your perusal."

(o) The tax invoice reflects the following:

Name of Supplier: A N Naanda, P O Box 24090, Windhoek

To name of Buyer: Standard Bank Namibia Limited, Vehicle and Asset Finance, P.O. Box 24090, Windhoek

The purchase price is N$150 000-00."

(p) The defendant's reply to the letter of demand is as follows:

> "4. We would hereby like to emphasize that the sale was initiated and agreed to between your client and Mr. Naanda without any involvement by the bank. The bank was merely the financier of a transaction whose subject matter was selected and negotiated between your client and Ms. Naanda.
>
> 5. Furthermore it is not the bank's duty as the financier of the transaction, to regulate the terms between the parties of such private agreement of sale nor was it the bank's duty to inspect a vehicle in such transaction (on behalf of the parties to the transaction) to determine the condition thereof: The bank cannot be held responsible for the condition of the vehicle. It was ultimately your client's duty, as purchaser in the private transaction to inspect the vehicle as presented by Ms. Naanda".

(q) The plaintiff was also referred to clause 5 of the instalment sale agreement. That clause (i.e. clause 5) reads as follows; "***Risk*****:** *As between purchaser and seller, risk in the goods shall pass to purchaser on the earlier of signature hereof by purchaser or the date when supplier to bear the risk."* The letter of Autohaus was handed up as Exhibit "F", the Tax Invoice as Exhibit "F1" and the letter of the defendant as Exhibit G".

Ms. Susanna Elizabeth Madjiedt

[10] Ms. Madjiedt amongst others testified that:

(a) She is a consultant of the defendant, and has worked for the defendant for a total of 19 years, and her duties and responsibilities are to assist the "walk in" clients who wish to purchase vehicles or other assets.

(b) If a client came to her and indicate that he wants to purchase a vehicle, she would normally ask for the following documents, salary slip, identification document, driver's licence, six months bank statement and his residential address. But if the transaction is a private transaction she would ask for the following documents; the registration documents of the

vehicle, the roadworthiness of the vehicle, police clearance and a copy of the seller's identity document.

(c) The plaintiff's application was dealt with by a colleague of hers in Keetmanshoop in January 2006, but in February 2006 the plaintiff was transferred to Windhoek and that is how she got into the picture. She further testified that the plaintiff's personal documents, the application and the approval were sent through to her from Keetmanshoop.

(d) After she received the documents from Keetmanshoop she called the plaintiff and informed him that she received his application for the purchase of a vehicle, from Keetmanshop and that she will henceforth communicate with him.

(e) After she spoke to the client, she asked the plaintiff to get the vehicle's registration papers, roadworthiness and police documents from the seller. She said she received these documents but she does not recall how she received the documents.

(f) After she received the registration certificate of Ms. Naanda, she did her HPI check (An HPI check is a check that is done to determine whether the vehicle was stolen or not.).

(g) After completing her HPI check (and was satisfied that the vehicle was not a stolen vehicle, nor was it finance by another financial institution), she called the plaintiff and drew his attention to the fact that the vehicle he wanted to buy is a rebuild. The plaintiff's reply to that was that the vehicle is a nice car low kilometres and it looks like a brand new vehicle. Thereafter she got the documentation ready, drew up the contract, filled in all the papers and called him to come and sign.

(h) When the contract was signed the defendant was fully aware that the vehicle was a build up.

(i) That all that she does is to take down the application and the approval is done by the credit manager.

(j) When the plaintiff came to sign the contract Ms. Madjiedt placed the contract in front of him and she then told him that the two of them will work through this document (i.e. the instalment sale agreement). She also told him that the document is a contract between him and Standard Bank, and she then explained all the clauses to him. After she took him through the contract she asked him whether he was satisfied and his reply was a yes. She than asked him to sign the contract. She furthermore testified that the plaintiff's attention was not drawn to the terms nor were the terms which formed an attachment to the contract explained to him.

[11] It is worth stating that after the plaintiff amended his particulars of claim the defendant asked for the plaintiff and for Ms. Madjiedt to be recalled to testify. I allowed both Ms. Madjiedt and Mr. Mbekele to be recalled. Ms. Madjiedt on recall testified as follows:

(a) On 02 March 2006, she received the registration papers of the vehicle (in respect of Ms. Naanda) by fax from Autohaus. After receiving the documents (i.e. the registration papers) she went through the documents, and that is where she picked it up that the vehicle was a rebuild vehicle.

(b) Out of "humanity" she called the plaintiff and asked him whether he knew that the vehicle he was going to buy was a rebuild vehicle. She

explained to the plaintiff that the car must have been in an accident and that the insurance must have paid for it.

Mr. Pieter Conradie

[11] The defendant also called a second witness Mr. Conradie but I am of the view that the evidence of Mr. Conradie is not relevant to the resolution of the dispute between the plaintiff and the defendant.

C THE LEGAL POSITION

[12] Generally our law recognises that a contract comes into existence if the parties are agreed on creating, between themselves, an obligation or several obligations as well as on all its particulars such as its content and subsidiary features. The consequences of a contract are obligations, the contents of which are the claims and duties to perform. Our law furthermore recognises that in keeping with good faith and in the public interest, serious expressions of intent must be adhered to and be given their intended legal consequences.

[13] Van der Merwe *et al* in their book: ***Contract: General Principles***: 2nd Edition: Juta at page 90 argue that some factors, however, warrant a departure from the principle that "serious expressions must be given their intended legal consequences" to the extent that a contractant is allowed to undo the consequences of his agreement (rescind or withdraw from the contract), because the agreement was defective in the sense that it was not conceived in the free and unfettered manner regarded by the law as necessary for the expression of a contractant's individual autonomy:" Amongst the factors upon which a contractant may avoid the consequences of an agreement is misrepresentation.

[14] In the South African case of ***Novick and Another v Comair Holdings Ltd and Others***1979 (2) SA 116 (W) Colman J at page 149 E-I outlined the of a misrepresentation to be:

"(a) That the representation relied upon was made.

(b) That it was a representation as to a fact. A promise, prediction, opinion or estimate or exercise of discretion is not a representation as to the truth or accuracy of its content; it can, however, often be construed as a representation that the person making it is of a particular state of mind.

(c) That the representation was false. In relation to an ordinary representation of fact, what must be shown is that the fact was not as represented. When a prediction, opinion or estimate is relied upon, what must be shown is not merely that it was, or turned out to be, erroneous, but that it did not represent the *bona fide* view, at the time when it was expressed, of the person who expressed it.

(d) That it was material, in the sense that it was such as would have influenced a reasonable man to enter into the contract in issue.

(e) That it was intended to induce the person to whom it was made to enter into the transaction sought to be avoided."

[15] Below I summarise Van der Merwe *et al* (supra) at pages 95 -103 formulation of the elements of the "delict misrepresentation in *contrahendo*" as follows;

"(a) **An act (conduct**). The act must be a representation made by a contractant or by someone for whose acts he is held liable. A representation is any conduct which creates a particular impression of the other contractant. The conduct may be a commission (...that is by a positive act, doing something) or an omission... (that is by refraining from doing something).

(b) **Wrongfulness:** As a delict misrepresentation involves wrongful conduct ....mis-representation by omission will only be wrongful if the misrepresentee breached some duty to act positively...A representation is not regarded as wrongful merely because it is false and actually misleads the contracting party;..the representation must relate to material facts.

(c) **Fault:** Fault in the context of misrepresentation is the legal blameworthiness which accompanies the wrongful conduct of the misrepresentor...Fault take two forms intent (***dolus***) and negligence (***culpa***).

(d) **Causation:** It is often said that a misrepresentation is actionable only if *inter alia* it has induced it has induced the misrepresentee to enter into the contract as it is".

D APPLICATION OF THE LAW TO THE FACTS.

[16] The plaintiff's case is that he saw a 2002 Audi A4 vehicle (the vehicle) which was for sale, he was interested in the vehicle and contacted Dr Naanda, the owner of that vehicle. The owner informed him of the selling price of the vehicle, which was N$150 000-000 (One Hundred and Fifty Thousand Namibia Dollars).

[17] Plaintiff did not have that amount of money; he accordingly approached the defendant and requested the defendant to provide him with financial assistance to enable him to purchase the vehicle. The defendant went further than providing financing to the plaintiff. The defendant purchased the vehicle from Dr. Naanda and then sold the vehicle to the plaintiff. When the defendant purchased the vehicle from Dr Naanda it became the owner of the vehicle. The instalment sale agreement in clause 4.1 in fact provides that ownership in the vehicle will remain with the defendant.

[18] The plaintiff placed before me evidence that:

(a) He concluded an instalment sale agreement with the defendant in terms of which the defendant sold a 2002 Audi A4 vehicle to plaintiff. I am thus satisfied that the plaintiff made the representation as to a fact that the merx that it is selling to the defendant is a 2002 Audi A4 vehicle.

(b) What he received is not a 2002 Audi A4 vehicle but a 2002 Audi A4 rebuild vehicle and that he had never seen the registration papers of the vehicle prior to him signing the instalment sale agreement. I am equally satisfied that that the representation that the vehicle is a 2002 Audi A4 was false. When the defendant purchased the vehicle from Dr

Naanda it became the owner of the vehicle. The defendant thus had a positive duty to act and inform the plaintiff that the vehicle that the plaintiff is purchasing is a rebuild vehicle. I thus reached the conclusion that the failure by the defendant to inform the plaintiff that the vehicle which he was purchasing is a rebuild vehicle was wrongful.

(c) If he had known that the vehicle was a rebuild vehicle he would not have entered into the instalment sale agreement. I am thus also satisfied that the representation relates to material facts and that the representation induced the plaintiff to enter into the agreement.

[19] The defendant's defences are multiple, first it alleges that the initial sale transaction was concluded between Dr. Naanda and the plaintiff without any involvement from defendant and that it merely acted as a financier. In the light of my finding that when the plaintiff approached the defendant with a request for financial assistance the defendant instead purchased the vehicle from Dr Naanda and sold the vehicle to plaintiff there is no merit in the defendant's assertion that its role was merely that of a financier. So this defence cannot assist the defendant. I am equally of the view that the assertions by the defendant that it was not involved in the initial negotiations are not helpful to its case.

[20] The second defence raised by the defendant is that: "*the plaintiff having had possession of the said documentation [i.e. the registration papers of the vehicle] prior to and pursuant to the transaction and having had access to its contents at all relevant times about the status of the vehicle without taking any steps whatsoever to address his alleged grievance in this regard"*. I interpret this approach by the

defendant to be an allegation that the plaintiff knew the status of the vehicle and elected to keep to the contract.

[21] Firstly the defendant did not lead any evidence to show that prior to the conclusion of the instalment sale agreement the plaintiff had possession of the registration papers of the vehicle. In her initially testimony Ms Madjiet, said she could not recall where she got the registration papers from. When she was recalled she testified that she got the registration papers from Autohaus (Pty) Ltd. I am thus of the view that the plaintiff's version that he did not see the registration papers of the vehicle prior to him signing the instalment sale agreement is probably true.

[22] Secondly Trollip JA, after quoting from the case of ***South Cape Corporations (Pty) Ltd V Engineering Management Services (Pty) Ltd*** 1977 (3) SA 534 (A) at 548 A-C where Corbett J.A. said:

> "the word *onus* has often been used to denote, inter alia, two distinct concepts: (i) the duty which is cast on the particular litigant, in order to be successful, of finally satisfying the Court that he is entitled to succeed on his claim or defence, as the case may be; and (ii) the duty cast upon a litigant to adduce evidence in order to combat a prima facie case made by his opponent. Only the first of these concepts represents *onus* in its true and original sense. In ***Brand v Minister of Justice and Another,*** 1959 (4) SA 712 (AD) at p. 715, OGILVIE THOMPSON, J.A., called it "the overall onus ". In this sense the onus can never shift from the party upon whom it originally rested. The second concept may be termed, in order to avoid confusion, the burden of adducing evidence in rebuttal ("weerleggingslas"). This may shift or be transferred in the course of the case, depending upon the measure of proof furnished by the one party or the other."

remarked as follows in the case ***Feinstein v Niggli and Another*** 1981 (2) SA 684 (A) at page 698 E-H

> "It seems that the onus resting on the representee mentioned by the authors of ***Actionable Misrepresentation*** (supra) in the above statements relates merely to the burden of adducing evidence in rebuttal, and not to the overall onus of proof. Otherwise it does not correctly reflect our law. For, according to our law, in my view, the overall onus of proving all the requisites of an election to affirm a contract otherwise vitiated by misrepresentation rests on the representor. He must therefore prove that the representee had the requisite knowledge. That is certainly so in regard to waiver. The party alleging a waiver of a contractual right retains throughout the

> proceedings the overall onus of proving that the other party had full knowledge of the right when he allegedly abandoned it (***Laws v Rutherford*** 1924 AD 261 at 263; and cf ***Netlon Ltd and Another v Pacnet (Pty) Ltd*** 1977 (3) SA 840 (A) at 872G - 873H and authorities there cited). And election generally involves a waiver: one right is waived by choosing to exercise another right which is inconsistent with the former. Indeed, election and waiver have been equated as being species of the same general legal concept. See ***Moyce v Estate Taylor*** 1948 (3) SA 822 (A) ;***Hlatshwayo v Mare and Deas*** 1912 AD 242 at 247; ***Montesse Township & Investment Corporation (Pty) Ltd and Another v Gouws NO and Another*** 1965 (4) SA 373 (A) at 381A - B; ***Van Schalkwyk v Griesel*** 1948 (1) SA 460 (A) at 473. Hence, no reason exists why the same rule about the overall onus of proof applicable in waiver should not also apply to election *mutatis mutandis,* subject only to this possible qualification. In waiver the owner's knowledge of the existence of the right must usually be proved before he can be said to have waived it; but in election the question arises, does proof merely of the representee's knowledge of the material facts constituting the misrepresentation suffice, or must knowledge of his rights thereby created also be proved, e.g. the right to rescind the contract or affirm it and claim damages? It would seem that it is necessary to prove knowledge of both the facts and the rights, since election means choosing between different rights, and how can such an election be duly made unless the representee knows what those rights are?

[23] I have thus arrived at the conclusion that the defendant has failed to prove that the plaintiff had complete knowledge of all material discrepancies between the representation and the real facts. The second defence must, accordingly also fail.

[24] The third defence raised by the defendant is that “upon receipt of the registration documentation from the Plaintiff himself and/or previous owner of the vehicle with whom the plaintiff initially secured the vehicle prior to applying for financing from the Defendant, the Defendant alerted the Plaintiff to the fact the documentation, received *via* fax reflected that the vehicle was a rebuild.”

[25] The plaintiff flatly denied that he was informed by Ms Madjiet that the vehicle was a rebuild. The evidence of Mr. Mbekele (Plaintiff) and Ms Madjiedt (for the defendant) are mutually destructive on this aspect. In the South African case of ***National Employers General Insurance v Jagers***: 1984 (4) SA 437, Eksteen

A.J.P said, that where there are two mutually destructive versions the Plaintiff 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 Respondent's allegations against the general probabilities. The estimate of the credibility of a witness will therefore be inextricably bound up with a consideration of the Respondent's then 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 Respondent's case anymore than they do defendant's, the Respondent 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 ."

Also see African Eagle Life Assurance Co Ltd v Cainer 1980 (2) SA 234

[26] I am of the view that the probabilities favour the version of the plaintiff more than that of the defendant. I say so for the following reasons:

(a) I formed the view that Messrs, Haimbili, Mbekele and Conradie's testimony in so far as it is relevant to this issues before me was credible. Ms Madjiet did not strike me as generally dishonest, but I consider that she was not truthful in some respects, (particularly on the point of whether she disclosed to the plaintiff that the vehicle in questions was a rebuild vehicle) I found her to be evasive and tailored her testimony to suit the defendant's case.

(b) The defendant's approach has been that it was not involved in the initial negotiations for the purchase of the vehicle and that there was no legal duty on it to disclose the fact that the vehicle is a rebuild.

(c) As it has emerged from evidence the allegation by the defendant that the defendant received the registration documents from the plaintiff and/or the previous owner is incorrect.

[27] In the circumstances I have come to the conclusion that the defendant misrepresented to the plaintiff that the vehicle that he bought was a 2002 Audi A4, thus entitling the plaintiff to rescind the contract.

E. THE REMEDIES

[28] The defendant in its plea denies that the plaintiff is entitled to tender the return of the vehicle or that it is liable to refund any instalment. The defendant basis its denial on the argument that the "Plaintiff's tender is defective in so far as it discounts the wear and tear as well as the value of the use and enjoyment of the said vehicle by the Plaintiff since March 2006 to date hereof"

[29] Van der Merwe *et al* (supra) at page 121 have the following to say with respect to the remedy of restitution: "It is generally said that an act which constitutes a ground for rescission renders a contract voidable at the behest of the aggrieved contractant. ...The aggrieved party also becomes entitled to restitution of performance already rendered, with the concomitant duty to return what he may have received. The restitution may entail not only what has actually been received but also such a sum of money as may be necessary to restore the other contractant *fully* to his previous position. "

[30] In the case of ***Feinstein v Niggli and Another*** 1981 (2) SA 684 at page 700 Trollip JA said:

> "The object of the rule [***restitutio in integrum]*** is that the parties ought to be restored to the respective positions they were in at the time they contracted. It is founded on equitable considerations. Hence, generally a court will not set aside a contract and grant consequential relief for fraudulent misrepresentation unless the representee is able and

willing to restore completely everything that he has received under the contract. The reason is that otherwise, although the representor has been fraudulent, the representee would nevertheless be unjustly enriched by recovering what he had parted with and keeping or not restoring what he had in turn received, and the representor would correspondingly be unjustly impoverished to the latter extent (see **Actionable Misrepresentation** (supra at para 294 and note 5 thereto); ***Marks Ltd v Laughto***n 1920 AD 12 at 21; ***Harper v Webster*** 1956 (2) SA 495 (FC) at 502B - D; ***Van Heerden en Andere v Sentrale Kunsmis Korporasie (Edms) Bpk*** 1973 (1) SA 17 (A) at 31G - 32A). But since the rule is founded on equity it has been departed from in a number of varying circumstances where considerations of equity and justice have necessitated such departure (see ***Harper's*** case...).

Thus, the deterioration in condition or the depreciation in value of the subject-matter of the contract while in the representee's possession will usually not preclude *restitutio* if that occurred in the ordinary course of events, or through its being used in the normal way as contemplated by the parties, or through some inherent defect or weakness in the subject-matter itself, and was not due to any fault of the representee (see ***Actionable Representation*** (*supra* para 295 at 310); the ***Marks'*** case supra at 21; Wessels ***Law of Contract in SA*** 2nd ed para 4742; ***African Organic Fertilizers and Associated Industries Ltd v Sieling*** 1949 (2) SA 131 (W) at 136; the ***Van Heerden*** case supra at 32A - 33A). Even where the deterioration or depreciation is due to the representee's fault, *restitutio* is not necessarily precluded, for the Court may allow him to adjust the deficiency by a monetary compensation."

[31] Also see ***Davidson v Bonafede*** 1981 (2) SA 501; where Marais AJ said:

"Restitutio in integrum

This remedy is available to one who has been induced to act to his financial detriment by the fraud of another. Voet 4.1.26. The scope and purpose of the remedy are described by Voet in this way (Gane's translation vol 1 at 577):

"It is an action for the making whole again of a matter or cause... It is otherwise described (insofar as it is granted by the magistracy) as a resetting and restoration of a transaction to its original state; or a making whole again of a cause which has been lost. It is an extraordinary remedy by which the praetor in virtue of his office and jurisdiction, taking the line of natural fairness, puts back injured or cheated persons for just cause into their original state, just as though no damaging transaction had taken place, or at least orders them to be indemnified".

"The effect of restitution is that all things are put back into their original condition, and that indeed in a single judicial action" (4.1.21 at 596).

"Moreover the person damaged gets restitution in such ways that along with the thing restored he receives also its fruits. An exception is when apt conditions are made by which fruits received can be set off against interest due on the other side. Ulpian propounds an arrangement of that kind in the law cited below."

"But on the other side he too against whom restitution is granted must have his original rights made whole again in so far as that can be done, and regard must be paid to his being indemnified, even though the restitution is made on the ground of fear or fraud. Just as he who obtains restitution ought not to be landed in loss, so neither should he find himself a gainer to the sacrifice of another. Whatever therefore has accrued to him from the purchase or sale or other contract he ought to restore" (4.1.22 at 598).

"In addition expenses which the opponent can prove were incurred on the thing must be refunded by the person obtaining restitution; unless they were luxurious, and such that only removal (of a luxurious addition to a building) is allowed; or unless they were beneficial indeed, but too heavy for the person obtaining restitution. It is not fair that the person getting restitution should either have to look for other creditors, or be compelled to sell what he prefers to keep to credit, or be driven by poverty to abandon the thing itself to his opponent. In this matter much must be left to the discretion of the judge, so that he may move as it were in the middle of the road, and neither grant too much to the person getting restitution, nor allow too much to an irksome opponent". (4.1.22 at 599)".

[32] In ***Bonne Fortune Beleggings Bpk v Kalahari Salt Works (Pty) Ltd and Others*** 1973 (3) SA 739 (NC) where Van Den Heever J said:

"In ***restitutio in integrum*** an attempt is made to put the parties to a contract retrospectively declared null and *void ab initio*, into the position in which they would have been had the contract not been concluded." (At 743H.)

[33] In ***Wood v Davies*** 1934 CPD 250, the Court ordered the seller of a house to repay to the purchaser, a minor, the purchase price with interest from the date of payment (my emphasis) but ordered the buyer to give the seller credit for a stated monthly sum representing the value of the use of the house, with interest calculated from the first day of each month in which each monthly sum would have been payable had it accrued as rent.

[34] I am not aware of any Namibian case which has rejected the above set out principles, which I accept as part of our law. In the result I am of the view that the defendant's denial that the plaintiff is entitled to tender the return of the vehicle is baseless.

[35] It seems to me that the relief claimed by the plaintiff in the main claim is substantially in accordance with what the law entitles the plaintiff to recover. The orders which I will grant are substantially those claimed by plaintiff in his main claim, but I have made adjustments (the adjustment that I make here is putting a percentage to the use and enjoyment of the vehicle by the plaintiff and deducting that percentage from the monthly instalments paid by the plaintiff) where appropriate to give effect to the principles which I have set out in this judgment. In the result I make the following orders:

(a) The cancellation of the instalment sale agreement concluded between the parties on 03 March 2006 is confirmed.

(b) The plaintiff must return and deliver the 2002 Audi A4 rebuild vehicle to the defendant and the defendant must against delivery to it of the 2002 Audi A4 rebuild vehicle pay to plaintiff the following:

(i) The initial repayment in the amount of N$ 30 000-00 (Thirty Thousand Namibia Dollars) plus interest on the amount of N$ 30 000-00 (Thirty Thousand Namibia Dollars) calculated at the rate of 20% per annum reckoned from the date of judgement to the date of payment;

(ii) The fifty three monthly instalments paid by the plaintiff to the defendant from 31 March 2006 to 30 September 2010 **Less** thirty percent on each instalment paid by the plaintiff to the defendant.

(c) The defendant must pay the costs of suit.

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UEITELE, AJ

ON BEHALF OF THE PLAINTIFF:	Mr.. I Titus
INSTRUCTED BY:	Koep &Partners
ON BEHALF OF THE DEFENDANT:	Mr E Shikongo
INSTRUCTED BY:	Shikongo Law Chambers