

**IN THE SOUTH GAUTENG HIGH COURT, JOHANNESBURG
(REPUBLIC OF SOUTH AFRICA)**

CASE NO: 34095/2008

DATE: 12 MAY 2016

In the matter between –

THE MOTOR FINANCE CORPORATION (PTY) LIMITED Plaintiff

And

XAVIER MOTORS CC t/a XAVIER MOTORS 1ST Defendant

SUHA KASLUOGLU 2ND Defendant

JUDGMENT

Cassim, AJ

Introduction

1. By way of application issued in October 2008, the applicant (“MFC”), a financier made application in this court against the first respondent a motor dealer (“Xavier Motors”) for the repurchase of five motor vehicles at a purchase consideration equivalent to the monies paid by MFC to Xavier Motors in respect of the vehicles. The parties sensibly agreed to separate merits and quantum and this part of the hearing relates to the merits of the claim.

2. The motor vehicles are identified in prayer 1.1 of the notice of motion as follows:
 - 2.1 1 x 2003 model BMW325i A/D (E46) F/L motor vehicle with Chassis Number WBAET3.....] (“BMW 325i”);
 - 2.2 1 x 2004 model Subaru Legacy 2.0 GT motor vehicle with Chassis Number JF1.....] (“Subaru Legacy”)
 - 2.3 1 x 2002 model BMW X5 3.0 A/T motor vehicle with Chassis Number WBAFA.....] (“BMW X5”);
 - 2.4 1 x 2003 model BMW M3 (E45) motor vehicle with Chassis Number WBSBL.....] (“BMW M3”);
 - 2.5 1 x 2006 model Renault Megane II 1.6S motor vehicle with Chassis Number VF1CM [1.....] (“Renault Megane”).
3. The second respondent, Mr Suha Kasluoglu is a party because MFC seeks to hold him liable for the obligations of Xavier Motors arising from the second respondent having bound himself as a surety and co-principal debtor in respect of the obligations of Xavier Motors in favour of MFC.
4. The respondents opposed the application and by consent the application was referred to trial. Having considered the 298 page application and because as I have found and is clear from the founding affidavit that applicant relies upon a written agreement to enforce its

claim, in my view defined issues should have been referred to oral evidence. The dispute in this case falls within the kind of narrow compass contemplated in rule 6(5) of the rules of court, primarily because the relationship is governed by way of a written agreement, and thus the methodology identified in **Metallurgical & Commercial Consultants (Pty) Limited v Metal Sales Co (Pty) Limited** 1971 (2) SA 388 (W) to define the issues ought to have been applied. This is a salutary practice because it compels the parties to reflect on the issues, and to crystallize the disputes in the order referring the matter to oral evidence. This practice should be reinforced by the courts. In this particular case the parties did file comprehensive pleadings but the pleadings seek amplification in the application papers. A referral incorporating the disputes to be determined by oral evidence assist the court and the parties in expeditiously and yet effectively dealing with the disputes.

5. Mr Meyer who appeared on behalf of the plaintiff in the proceedings before me, relied on the written agreement entered into between MFC and Xavier Motors. The basic rule regarding interpretation of a written agreement is that no evidence may be given of its terms except the document itself, nor may the contents of such document be contradicted, altered, added to or varied by oral evidence (**The Law of Contract, Christie, 5th Ed** – page 192; **Lowrey v Steedman** 1914 AD 532 Act 543; **Sealed Africa (Pty) Ltd v Kelly & Another** 2006 (3) SA

65 (W) at paragraph [15] per Epstein AJ). It is useful to reiterate the principles this court must adhere to in dealing with a written agreement.

5.1 In an action on a contract, the rule of interpretation is to ascertain, not what the parties' intention was, but what the language used in the contract means, i.e. what their intention was as expressed in the contract. (**Worman v Hughes** 1948 (3) SA 495 (A) Act 505);

5.2 The first step in construing a contract is to determine the ordinary grammatical meaning of the words used by the parties (**Sassoon Confirming & Acceptance Co (Pty) Ltd v Barclays National Bank Ltd** 1974 (1) SA 641 (A) 646B).

5.3 No evidence may be given to alter the plain meaning of an agreement (**Rand Rietfontein Estates Ltd v Cohn** 1937 AD 317 at 326);

5.4 The document is to be given its grammatical and ordinary meaning, unless this would result in some absurdity or some repugnancy or inconsistency with the rest of the instrument. (**Coopers & Lybrand v Bryant** 1995 3 SA 761 (A) 767E-768E);

5.5 Regard may be had to background and surrounding circumstances when the language of the document is, on the face of it, ambiguous, save that the court is precluded from taking into account “direct evidence of their own (the parties to the agreement) intentions” (Cooper’s case at 767E-768E).

5.6 However, should a party seek to place a construction on a document that differs from the document’s *prima facie* meaning, that party has to plead the circumstances relied on for this construction (**Dorman Long Swan Hunter v Karibib Visserye Ltd** 1984 (2) SA 462 (C) at 476G-H):

“Non constat, however, is it necessary to plead a reliance on surrounding circumstances where the meaning of the document is uncertain or ambiguous or where the other party contends that it bears a meaning other than its prima facie meaning, and where the Court is satisfied that there is uncertainty or ambiguity as to the proper construction of the contract.”

5.7 Insofar as a party intends to rely upon background circumstances or facts, these facts must be pleaded (**Streek v East London Daily Dispatch (Pty) Ltd** 1980 (1) SA 151 (E) at 156H).

6. In **KPMG v Securefin Ltd** 2009 (4) SA 399 SCA at paragraph 39, the court summed up the principle as follows:

*“[39] First, the integration (or parol evidence) rule remains part of our law. However, it is frequently ignored by practitioners and seldom enforced by trial courts. If a document was intended to provide a complete memorial of a jural act, extrinsic evidence may not contradict, add to or modify its meaning (**Johnson v Leal** 1980 (3) SA 927 (A) at 943B). Second, interpretation is a matter of law and not of fact and, accordingly, interpretation is a matter for the court and not for witnesses (or, as said in common-law jurisprudence, it is not a jury question: Hodge M Malek (ed) **Phipson on Evidence** (16 ed 2005) paras 33-64). Third, the rules about admissibility of evidence in this regard do not depend on the nature of the document, whether statute, contract or patent (**Johnson & Johnson (Pty) Ltd v Kimberly-Clark Corporation and Kimberly-Clark of South Africa (Pty) Ltd** 1985 BP 126 (A) ([1985]) ZASCA 132. Fourth, to the extent that evidence may be admissible to contextualise the document (sine ‘context is everything’) to establish its factual matrix or purpose or for purposes of identification, ‘one must use it as conservatively as possible’ (**Delmas Milling Co Ltd v Du Plessis** 1955 (3) SA 447 (A) at 455B-C). The time has arrived for us to accept that there is no merit in trying to distinguish between ‘background circumstances’ and ‘surrounding circumstances’. The distinction is artificial and, in addition, both terms are vague and confusing. Consequently, everything tends to be admitted. The terms ‘context’ or ‘factual matrix’ ought to suffice. (See: **Van der Westhuizen v Arnold** 2002 (6) SA 453 (SCA) ([2002]) 4 All SA 331) paras 22 and 23, and **Masstores (Pty) Ltd v Roberts Construction (Pty) Ltd and Another** 2008 (6) SA 654 (SCA) para 7).”*

The relationship between MFC and Xavier Motors

7. In this trial I was told very little about Xavier Motors. The only witness for Xavier Motors, Ms Lancaster, the manageress of the business informed me that she managed the business for it would appear the beneficial owner, the second respondent Kasluoglu. Xavier Motors was at the material time a preferred approved dealer by MFC.

8. Xavier Motor's status as an approved preferred dealer by MFC must have been motivated if not wholly premised by the terms of the Master Discount Agreement entered into between MFC and Xavier Motors on 19 July 2005 as amended on the 24th January 2007 ("the agreement or MDA")
9. The MDA in part A contemplates Xavier Motors from time to time offering to cede its rights under any or all of its contracts to MFC ("the offer to cession) by furnishing MFC with a complete credit application form furnishing details of the applicant who is to conclude a dealer contract with Xavier Motors, a description of the goods in question and other relevant information in relation to the transaction in question as may be requested by MFC from time to time. MFC may, in its sole discretion, accept or reject all or any of the offers to take cession. Part B, contemplates Xavier Motors from time to time offering to sell goods to MFC by furnishing MFC with a copy of the tax invoice relating to the goods which tax invoice shall fully identify and describe the goods by way of serial and identification numbers. MFC may in its sole discretion accept or reject all or any of the offers to purchase. In the event of MFC accepting any offer to take cession or any offer to purchase, the general provisions contained in part C of the MDA are of application.

10. In practical terms this means the following. In the case of Xavier Motors selling motor vehicles on credit to its customers, Xavier Motors looks to MFC to finance the transaction. In practice this is done in two ways. Generally speaking the dealer cedes its rights in the transaction to the financier with or without recourse. With recourse means that the financier can look to the dealer for recovery of the monies it expended in the event of default by the customer. The other way this credit transaction is undertaken is that the vehicle is sold to the financier which then resells it to the customer. In both instances the recourse which the financier has against the dealer is generally speaking, as in this case, determined by the terms of the MDA.
11. Mr Meyer, informed me at the commencement of the proceedings and as is pertinently set out in the application papers that MFC relied upon the following terms contained in the MDC to vindicate its claim:

“7. DELIVERY

...

7.3 The Dealer shall deliver or procure delivery of the goods specified to the relevant Customer, and procure that such Customer signs an acknowledgement of receipt of delivery of such Goods which acknowledgement the Dealer shall furnish to MFC.

7.4 *The Dealer shall retain the risk in and to the goods until such time as the Dealer has delivered or procured the delivery of the Goods to the customer.*

12. **DELIVERY**

12.1 *MFC shall be deemed on conclusion of a MFC contract to have instructed the Dealer to deliver ownership of the Goods to MFC by way of constructive delivery.*

...

12.3 *The provisions of 7.3, 7.4 and 7.5 similarly shall apply equally to the delivery of ownership of the Goods as contemplated in this Part B.*

15. **WARRANTIES**

The dealer warrants in respect of each Cession of a Dealer Contract and each sale of Goods, as the case may be, that:

...

15.14 *neither the Customer nor the Dealer, being the parties to such Dealer Contract, is entitled to terminate such Dealer Contract for any reason whatsoever.*

15.23 Information provided to MFC in regard to the Customer's identity and credit worthiness is to the best of the Dealer's knowledge true and correct and the Dealer has not withheld any information from MFC.

15.26 The Dealer has taken all steps to verify the Customer's credit information as contemplated in 16.

15..28 Complete delivery of the Goods has been made to the Customer and unqualified acceptance of the Goods has been taken by the Customer prior to payment being made by MFC to the Dealer of the Cession Purchase Price or of the Sale Purchase Price, as the case may be.

...

16. CREDIT INFORMATION

16.1 The Dealer shall in respect of each offer contemplated in 3.3 obtain sufficient and comprehensive credit information in respect of the Customer, in the format required by MFC from time to time and reflected in the Credit Application Form or such other form as MFC may require from time to time, and the Dealer will furnish such credit information to MFC at the time as contemplated in 5 or 10, as the case may be.

16.2 *The Dealer shall ensure that:*

16.2.1 *The Customer signs the Contract in the presence of the Dealer's staff;*

16.2.2 *The identities of the signatories and witnesses are clearly reflected on the Contract and;*

16.2.3 *The Dealer's staff verifies that the identity photo of the person purporting to be the Customer matches the person signing the Contract – such verification must be made with reference to an original identity document or original passport that must be presented to the Dealer's staff for this purpose.*

...

19. **INDEMNITIES**

The Dealer indemnifies MFC and holds it harmless against any claim of whatever nature that may arise out of or defences which may be raised by any person or loss or damages or expense (including legal costs on the scale as between attorney and his own client) arising out of or in connection with or which may be sustained or incurred by MFC as a direct consequence of:

19.1 *a breach or non-performance by the Dealer of any of the terms, conditions, warranties or undertakings of the Dealer in terms of this agreement or any Cession pursuant thereto including, but not limited to, any negligent misrepresentation (whether negligent or otherwise) by the Dealer to MFC; or*

19.2 *a fraudulent sale of the Goods or other fraudulent action by any of the Dealer's employees.*

20. **BREACH**

20.1 *An event of default shall occur if:*

20.1.2 *The Dealer breaches any of the warranties furnished by the Dealer in terms of this agreement;*

...

20.2.5 *Demand that the Goods purchased by MFC be sold back to the Dealer and that the rights of MFC in terms of the relevant MFC contract relating to such goods be ceded to the Dealer.*

20.3 *If MFC elects to enforce its rights under 20.2.4 or 20.2.5, the goods specified in the notice shall be deemed to have been sold to the Dealer by MFC, and the rights of MFC, in terms of the relevant contract shall be deemed to have been ceded to the Dealer by MFC upon receipt by the Dealer of the notice for an amount equivalent to the present value of the collectable under the contract (as at the date of receipt of that consideration by MFC) plus all costs and expenses which MFC has incurred up to date of receipt of the aforesaid amounts (which costs and expenses shall include, but not be limited to, costs and expenses incurred by MFC in connection with the repossession, storage, repair and sale commission).*

20.4 *Where there is a breach by the Dealer and for whatsoever reason the goods cannot be physically returned to the Dealer (due to a loss of goods be it by theft or otherwise) MFC shall not be under any obligation to deliver the goods back to the Dealer.*

...”

The transactions concerning the five motor vehicles being the subject matter of this application.

12. The five motor vehicles were sold by Xavier Motors to MFC during the period September 2007 to April 2008 in terms of the MDA. It is common cause that the individual customer to whom these vehicles were sold was not the person identified in the tax invoice.

fraud, if not syndicate (fraud)

13. Four of the five persons to whom the vehicles were purportedly sold to, testified in this hearing. Messrs Mnisi, Nwedamutswu, Khabo and Mushwana attended court under subpoena and gave evidence to the following fact.

13.1 They did not purchase the motor vehicles they are alleged to have purchased. Each of them had no idea as to the physical location of Xavier Motors, never attended at the premises and took no delivery of any vehicle.

13.2 The signatures on a host of documents purporting to be their signatures is a forgery;

13.3 The information supplied on the pre agreement statement as well as the contract for vehicle finance is not theirs but forged;

- 13.4 Their identification documents and drivers licence were appropriately forged and used in the perpetration of these unlawful transactions;
- 13.5 Regrettably such is the state of our nation that two of them were duped by Metro Police at roadblocks to produce their drivers licence under the pretext that it was for lawful examination and whereas in one instance another persons licence was returned and in another instance the police officers, on friendly terms, engaged the individual and in the process did not return the drivers licence to him. This as I have already alluded to, is a serious indictment on law enforcement agencies in our society at large. In this court's view, the only effective manner in curbing this unacceptable conduct is for the courts to be tough on corruption and either unlawful conduct particularly where it is perpetrated by police officers.
14. Mr Smit who appeared on behalf of Xavier Motors correctly in my view accepted as common cause that in each five instances there was fraud in that the person alleged to have purchased the vehicle from MFC was in fact not the person who purchased the vehicle.

15. This court must also record that each of the four persons who testified before me were good solid South African citizens. Their experience arising from the wrongful use of their identities created havoc in their lives. Their credit facilities were wrongly curtailed because their documentation was used by others to perpetrate a fraud. In the records of the authorities they were registered as the owner of motor vehicles purchased by others and they stood liable for licence fees and other charges whereas in truth and in fact they were not liable. The administrative hurdles for these individuals to overcome, although innocent victims were enormous in terms of resources and emotionally. One of them put to me that his life had been consumed by events beyond his control. This court will appreciate it if MFC continues to render its assistance to these individuals in order to regularise their affairs.
16. Not a single instalment was paid in respect of each of the instalment sale agreements. MFC, as owner of the vehicles, reported the five vehicles as having been stolen, and two of the vehicles, namely the Subaru Legacy and the Renault Megane were recovered by the police.
17. MFC argues that Xavier Motors breached its obligations in two material respects. First, it gave delivery to persons who are fraudsters and not the persons who purported to purchase the vehicles. Secondly, Xavier Motors did not exercise the kind of care it ought to have in detecting that

there was material irregularities in the paperwork relied upon by the fraudsters.

Non-delivery

18. MFC relies upon the provisions of clause 7.3 and the warranty contained in clause 15.28 in the MDA. Customer in clause 1.1.6 means any person other than the MFC, bound to the dealer in terms of a dealer contract and “dealer contract” in clause 1.1.7 is defined as the written agreement relating to the goods concluded by the dealer with its customers.
19. In each instance, delivery did not take place to the person allegedly purchasing the motor vehicle. By means of fraud and deception the motor vehicle was delivered to some other person. The person alleged to have purchased the motor vehicle did not buy the vehicle. Ordinarily, it thus follows that delivery did not take place as is contemplated in clause 7.3 of the MDA and MFC was led to believe that proper delivery took place and made payment in breach of the warranty give by Xavier Motors in clause 15.28 of the MDA. Ms Lancaster, it is common cause, held out that in each instance, the person receiving delivery was in fact the customer. This is in fact not so.
20. Mr Smit argued that non-delivery to the persons who were supposed to have purchased the vehicles, but in fact never purchased it (because they were not party to the transaction); their identity documents and

drivers' licence being used by fraudsters, is not a reason or justification to impose liability on Xavier Motors. On a proper construction of the relationship between MFC and Xavier Motors I should find that once Xavier Motors sold the motor vehicles to third parties, Xavier Motors thereafter become the agent of MFC and hence MFC must accept liability and responsibility for the loss. In this context, he urged me to have regard to the judgment of the House of Lords in **Shogun Finance Ltd v Hudson** 2003 UKHL 62. Mr Smit referred me to various portions of the judgment to argue that, in these circumstances, Xavier Motors is neutral. Xavier Motors completed its obligations by undertaking a cursory credit check on the potential customers and on the face of things relied upon fraudulent identity documents, drivers' licence and information, but was *bona fide* and liability cannot be attached to Xavier Motors for the fraud committed on MFC. Xavier Motors, on this argument, could not have done more.

21. I disagree. Unlike the case of **Shogun Finance Ltd v Hudson**, the relationship between MFC and Xavier Motors is regulated by a written agreement and MFC's cause of action is based on the written agreement. Ultimately, the test or issue is whether Xavier Motors complied with its obligations or not.

22. I find that Xavier Motors breached its obligations arising from clause 7.3 and breached the warranty contained in clause 15.2.8 of the MDA. I record that the evidence on behalf of MFC established that payment was made by MFC to Xavier Motors after having been satisfied by Xavier Motors that complete delivery of the motor vehicle in question had been made to the customer, whereas delivery was made to a third party fraudster.

Credit information

23. I have set out in paragraph 11 above, the contents of clause 16 of the MDA dealing with credit information. In my view, Xavier Motors did not measure to the requirements imposed on it by clause 15.2.6, namely that it shall take all steps to verify the customers' credit information as contemplated in clause 16.
24. I find it unacceptable that Ms Lancaster could not have detected that those purporting to be the individuals in the five identity documents and licence documents were in fact not the proper persons. On her evidence, she managed the business of Xavier Motors and dealt with, literally speaking, hundreds of applications for credit; she is an accredited FAIS agent and registered as a financial service provider and, in my view, she did not exercise reasonable caution expected of a person in her position. Otherwise, she would have detected material irregularities. Thus for instance, she failed to observe that the signature of Mnisi on the application for instalment finance is materially different

on the acknowledgement of delivery forms which she says, under declaration, was completed in her presence. The signature is also different to the naked eye on the agreement between MFC and Mnisi. The photograph on Mnisi's driver's licence is different from the photograph in his identity document. She should have had regard, in these circumstances, to the signature appearing on the reverse side of the driver's licence which she did not do. There are numerous other examples pointed out in cross-examination by Mr Meyer as to why she ought to have been put on the alert and should have interrogated the information more closely. The first name of one of the four people who testified before me is different in the forged identity document as compared to the original identity document which was demonstrated in the evidence before me. A similar cell number is used in two separate applications for two different individuals for finance. In all five applications, it is a common feature that the salesperson is one Allistair who is still in the employment of Xavier Motors and he may have been in a position to throw more light on how this fraud was perpetrated. He was, however, not called to testify.

25. Ms Lancaster's evidence was in the nature of general evidence. She could not throw light on the five cases before me, but testified as to the pattern she followed generally. Thus, generally, she would interview each applicant for credit by reference to the applicant's identity document, passport and driver's licence. She could not, however, explain why in these five cases Xavier Motors was duped. Moreover, on her own version, she caused the release of five motor vehicles whereas

there was proof of only one insurance policy in respect of a single motor vehicle, whilst it was a requirement that before the motor vehicles were released to the customers, there must be insurance cover taken on the motor vehicle to protect the interest of MFC. There was no debate that this was a requirement.

The records of Xavier Motors

26. Discovery by Xavier Motors in this trial is, in the circumstances, dismal. Other than financial statements for the years ending February 2007 to February 2010, the court is told very little about Xavier Motors. As at February 2008, it had gross revenue made up of sales slightly in excess of R37 million. No documentation are discovered relating to these five transactions, being the subject matter of this trial. The response that everything was furnished to MFC is unhelpful. A business generating turnover of R37 million must have systems and structures to record each of its transactions. This court would have expected a file or other methodology recording all material events *apropos* each transaction. A failure to have this readily available must result in an adverse inference against Xavier Motors that it did not conduct its business as is required of a reasonable business. The result being that I must find that Xavier Motors was negligent and/or did not comply with the requirements imposed on it by clause 16 read together with clause 15.2.6 of the MDA.

Conclusion

27. In the result, I find in favour of the plaintiff, MFC. I am satisfied that MFC is entitled to the relief provided in the MDA in clause 20.3 which is set out in paragraph 11 above. In the result, I grant a draft order in terms of annexure “X” attached hereto dated and initialled by me.

The Registrar

High Court Chambers
21 September 2011