REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

CASE NO: A609/2012

14/4/2015

(1) REPORTABLE: YES

(2) OF INTEREST TO OTHER JUDGES: YES

11 June 2014 E M Mbuli

DATE SIGNATURE

In the matter between:

MANDLA STANLEY MNGUNI **APPELLANT**

and

PRIMA INSPECTACAR WONDERBOOM (PTY) Ltd **RESPONDENT**

JUDGMENT

Heard on: 26 March 2014

Handed down on: ~~11 June 2014~~

14/4/2015

KUBUSHI, J

[1] Mandla Stanley Mnguni, the appellant in this instance, sued, Prima Inspectacar Wonderboom (Pty) Ltd, the respondent ,for the payment of an amount of R70 000 being a deposit he paid as part of the purchase price of a motor vehicle he wanted to buy from the respondent.

[2] The trial court on 3 February 2012 found in favour of the respondent and dismissed the appellant's claim with costs. Consequently, with leave of the Supreme Court of Appeal, the appellant is before us appealing against the whole of the said judgment and order of the trial court.

[3] At the commencement of the hearing of this appeal, the appellant's counsel moved an application for the recusal of one of the sitting judges, namely, Bofilatos AJ. However, during argument on this point he withdrew the application.

[4] The dispute between the parties emanates from a transaction that went horribly wrong. The factual matrix is that on 27 November 2009 the appellant expressed an interest to buy a white Toyota Hilux LDV D4D double cab motor vehicle (the motor vehicle) from the respondent. The purchase price of the motor vehicle was R208 935. The appellant inspected the motor vehicle which was on the shop floor and was satisfied with the condition in which it was. The appellant having shown interest was asked to pay in a refundable amount of R1 000 as a "holding deposit" which he did. The respondent is a dealer in the sales of motor vehicles and was, during these negotiations represented by one of its sales persons, Petrus Johannes Bouwer (Bouwer).

[5] On 4 December 2009 the appellant returned to the respondent's premises and paid a deposit of R70 000 leaving a balance of R 138 935. The R1 000 "holding deposit" was paid back to him. Initially the appellant had intended to finance the balance of the purchase price however he talked to his father who offered to pay that balance for him. He went with his father to the respondent's premises on 7 or 8 December 2009 to show him the motor vehicle which he intended purchasing. After inspecting the motor vehicle his father was also satisfied about the condition of the motor vehicle. On 10 December 2009 the appellant together with his father returned to the respondent's premises with the intention to pay off the outstanding balance and to take delivery of the motor vehicle. The appellant gave Bouwer a cheque of R138 935 which was in full and final settlement of the outstanding balance. However, when he wanted to take delivery of the motor vehicle the motor vehicle could not start even after it was jumped started. The appellant then informed the salesman that he was no longer interested to proceed with the deal and demanded return of his money, the R70 000 paid in as a deposit and the cheque of R138 935 paid to respondent. He was informed that the cheque is already at the bank and that he will not get the R70 000 back. The appellant's father subsequently instructed the bank not to pay the cheque.

[6] I should state that during his evidence in chief, the appellant mentioned that the motor vehicle also had a dent and its tyres were worn out, which according to him was not the case when he and his father inspected the motor vehicle. However, I do not intend to deal with these averments as they were not pleaded.

[7] It is common cause that the appellant was given an 'offer to purchase' by Bouwer which he signed. The 'offer to purchase' signed by the appellant which, formed part of the record, was not dated. There was as a result a dispute at the trial between the parties as to when this 'offer to purchase' was given to and signed by the appellant. According to the appellant he was given the 'offer to purchase' which he signed at the time when he paid the deposit of R70 000, that is on 4 December 2009. He signed the 'offer to purchase' as proof of payment of R70 000, he said. In addition he was given a tax invoice which indicated the outstanding balance. To the contrary, the respondent's evidence was that the appellant was given the 'offer to purchase' and signed it when he paid the holding deposit of R1 000, that is on 27 November 2009.

[8] There was also a dispute as to the contents of the 'offer to purchase' which the appellant signed. The appellant's evidence was that a copy of the 'offer to purchase' which was given to him and which he signed consisted only of a single page. The respondent's version on the other hand was that the 'offer to purchase' consisted of two pages. The contents of the 'offer to purchase' were on a single page which was typed on both sides. The terms and conditions to the 'offer to purchase' were on the reverse side of the single page. It was the respondent's evidence that the appellant was made aware of the said terms and conditions. The respondent's witness, Bouwer, averred that the terms and conditions were read out to the appellant and he (Bouwer) made the appellant aware that by signing the 'offer to purchase' he (the appellant) will be legally bound by them. This was vehemently denied by the appellant.

[9] The appellant's case in terms of his particulars of claim, which was also his evidence at the trial, was that there was no agreement of sale concluded between the parties because the respondent refused to sign the 'offer to purchase' until the full purchase price had been paid. Having initially paid a deposit of R70 000, when he tendered to pay the balance outstanding the respondent delivered to him a defective motor vehicle which resulted in him refusing to proceed with the transaction. The agreement between them was as such never concluded. He as a result claimed the return of the deposit paid. In replication to the respondent's plea, the appellant pleaded the provisions of *inter alia* sections 16, 17, 18, 19, 20, 48, 61 and 65 of the Consumer Protection Act 2008, which entitled the appellant to cancel the agreement with impunity, should the trial court conclude that an agreement was in fact concluded between the parties. He pleaded further that in so far as the written agreement provides for the respondent to retain the deposit as *rouwkoop*, that such clause was unfair, unreasonable and unjust and falls to be declared unjust by the court and that it was in contravention of s16 of the Consumer Protection Act.

[10] In the converse the respondent's case was that the parties signed an 'offer to purchase' which governed the terms and conditions of the sale. The appellant alleged in its pleadings that in terms of the purchase agreement it was entitled to keep the deposit as *rouwkoop*. At the trial Bouwer testified that he signed the 'offer to purchase' on the same day, 27 November 2009, that the appellant signed even though it was not at the same time. He also alleged that the 'offer to purchase' was signed by his manager Andries as well. The respondent produced an undated 'offer to purchase' which was signed by both parties. The said 'offer to purchase' was accepted into the record as exhibit A2a.

WAS THERE AN AGREMENT OF SALE BETWEEN THE PARTIES?

[11] At the commencement of the trial the parties' counsel were of the view that the issue which required determination by the trial court was whether or not the appellant was entitled to the return of the R70 000. This main issue had the following underlying issues as well, namely, whether or not there was an agreement of sale between the parties; whether or not the respondent failed, neglected or refused to deliver the motor vehicle; and whether or not the Consumer Protection Act applies.

[12] Based on the factual background of the case, the trial court came to a finding that it was never an issue whether or not there was an agreement of sale between the parties and concluded as a result that an agreement of sale existed between the parties. Consequently, according to the trial court, the only issue that remained to be determined was whether or not the appellant was entitled to claim the return of the deposit of R70 000 that was paid to the respondent as a deposit towards the purchase price of the Toyota Hi Lux LDV motor vehicle, without having alleged repudiation and acceptance of such repudiation in his particulars of claim. And if so, whether the conduct of the respondent in failing to deliver the said motor vehicle on the date the full purchase price was paid, entitles the appellant to the refund of the R70 000 without having alleged and proved cancellation of the agreement.

[13] The trial court having ruled that there was an agreement between the parties was of the view that the appellant should have alleged and proved repudiation and acceptance thereof as well as cancellation of the agreement to enable him to base his claim on restitution. It concluded as such that since the appellant did not approach the court based on repudiation and acceptance thereof and/or cancellation of the agreement his claim should consequently not succeed. It as a result found in favour of the respondent and dismissed the appellant's claim.

[14] The appellant in his notice of appeal raised numerous grounds of appeal. However the only one canvassed at the hearing of the appeal was in respect of the non-conclusion of the sale agreement. The contention by the appellant's counsel is that in terms of a copy of the 'offer to purchase' that was given to the appellant, the appellant is the only one who signed that 'offer to purchase'. He asserts also that the said 'offer to purchase' did not contain the terms and conditions of the sale on the reverse side of it as alleged by Bouwer. According to counsel, the tax invoice which was given to the appellant had a condition which stipulated that the giving of a cheque does not amount to payment until the cheque is met. Therefore, taking into account that the appellant had signed the 'offer to purchase' which had not been accepted, the appellant returned on 10 December 2009 to the respondent's premises and gave Bouwer a cheque for the balance of the purchase price with the intention to conclude the agreement. His contention was that the terms and conditions underpinning the payment of the deposit was an oral agreement. He submitted in argument that the payment of the R70 000 deposit was a separate agreement – in fact, according to him, there were three agreements concluded by the parties. The first one was an oral agreement in respect of the payment of the R1 000 'holding deposit' which was paid back; the second which

was also oral was in respect of the payment of the deposit of R70 000 and lastly, the written 'offer to purchase' which was in respect of the balance of the purchase price. The 'offer to purchase', however, remains inchoate because the respondent did not sign.

[15] To my mind, the trial court must have arrived at its finding that an agreement of sale was concluded between the parties, by inference that the parties had not intended for the purported agreement to be valid and binding only when reduced to writing. The trial court even went as far as to state in its judgment that it was not material whether the agreement was oral or written in order to determine the issues in this matter. My view is that the trial court was wrong to have concluded as such and in this regard it erred.

[16] I should also at the outset state that I do not agree with the appellant's counsel that there were three agreements entered into by the parties. What I can say is that there were negotiations which started when the appellant expressed an interest to purchase the motor vehicle from the respondent, which negotiations culminated into a written agreement the terms and conditions of which are embodied in the 'offer to purchase'. I am as a result prepared to accept that the said terms and conditions were incorporated on the reverse side of the page which contained the 'offer to purchase', as alleged by the respondent.

[17] The general rule is that an agreement must be expressed by the concerned parties either verbally, in writing or by conduct. Where an agreement does not in law have to be in writing, such an agreement will have binding force only if the parties agree beforehand that writing shall constitute a formality. The agreement of sale in this instance was not required in law to be in writing. An oral agreement would have sufficed and would have been of force and effect. However, to my mind, the parties in agreeing to sign the 'offer to purchase' agreed that the agreement between them will be in writing and as such imposed the reduction of the agreement of sale to writing as a formality without which the agreement could not come into existence. An inference can also be made from clause 15 of the 'offer to purchase' (the non-variation clause) which stipulates that:

> "15. No variation of the terms and conditions herein shall be of any force or effect unless in writing and signed by both you and me."

Consequently, it was, in my opinion, material that the agreement between the parties be in writing since such agreement could only be regulated by the terms and conditions contained in the 'offer to purchase'. See *SA Sentrale Ko-operatiewe Graanmaatskappy Bpk v Shifren en Andere*[1].

[18] It is trite that in order for a valid agreement to come into existence the parties thereto must reach *consensus*. There must be a meeting of the minds regarding the conclusion of a legally binding agreement between them. The law of contract

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1 1964 (4) SA 760 (A) at 706C – G

requires that the expression of such *consensus* be done through the process of offer and acceptance. See *Collen v Rietfontein Engineering Works*[3].

[19] In this instance, the offer by the appellant was valid but what was in issue was the acceptance, the question being whether or not there was a valid acceptance. Acceptance must comply with certain requirements in order for it to be valid. Firstly, the acceptance must be made with *animus contrahendi* by the person to whom it was addressed (the offeree). Secondly, it must correspond to the exact terms of the offer, failing which it becomes a counter offer. Thirdly, the acceptance must be communicated to the offeror. Lastly, to be effective, it must take place before the offer is terminated.

Only the last two requirements are in dispute in this instance.

[20] The appellant contends that the offer it made to the respondent was not accepted because at the time it terminated the offer it had not been signed by the respondent and as such the agreement was not concluded. In terms of his evidence when he signed the 'offer to purchase' the respondent or its representative did not sign. He in fact did not see the respondent's representative sign the 'offer to purchase' Bouwer's evidence, on the other hand, was that the 'offer to purchase' was signed. He however conceded that, although he signed the 'offer to purchase' the same day that the appellant signed it, he did not sign it in the presence of the appellant. Even though he did not mention the date that his manager, Andries, signed the 'offer to purchase' his testimony was that he also signed.

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3 1948 (1) SA 413 (A) at 428

[21] It is a general rule that acceptance must be communicated or brought to the knowledge of the offeror. The communication of acceptance can take any form except where the offeror has presented a particular method of acceptance, in which case the acceptance must be made in the prescribed manner in order for an agreement to come into existence.

[22] Clause 1.2 of the offer to purchase states the following:

> "1. I acknowledge and agree:
>
> 1.1 . . .
>
> 1.2 that until the offer is accepted in writing by a duly authorised manager on your behalf, you shall not be obliged to deliver or make available to me the vehicle sold."

[23] My view is that, in this instance, the appellant prescribed a particular form of acceptance. The terms of this clause, are a clear declaration that the 'offer to purchase' could only come into existence (be accepted) upon signature by the 'duly authorised manager' of the respondent. A prescribed method of acceptance constitutes the only method of acceptance which is capable of giving rise to the agreement. See *Law v Rutherfurd*[4]. Therefore, the only way in which it could be said there was acceptance was when 'a duly authorised manager' had signed the offer to purchase on behalf of the respondent. If it is to be accepted that Bouwer and his manager, Andries, did sign the offer to purchase on behalf of the

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4 1924 AD 261

respondent accepting the appellant's offer, two questions come to the fore. Firstly, is Bouwer or Andries duly authorised managers in terms of the 'offer to purchase'; if so, did such acceptance come to the knowledge of the appellant (was it communicated to the appellant)?

[24] The issue of whether Bouwer and/or Andries were duly authorised managers to sign the 'offer to purchase' on behalf of the respondent did not arise on the pleadings nor was it canvassed during trial and as such the trial court did not deal with it. I shall accept, for purposes of this judgment, that either of them was a duly authorised manager.

[25] As already stated, in this instance, the appellant prescribed writing as a form of acceptance and as such for the appellant's 'offer to purchase' to be accepted, in terms of clause 1.2 of the 'offer to purchase', a 'duly authorised manager' had to sign. Where the fact of signature was not observed what would conclude the agreement was the communication of the fact to the appellant that the signature has been appended to the 'offer to purchase'. It is common cause that Bouwer and Andries did not sign the 'offer to purchase' in the presence of the appellant. Bouwer's evidence is that he together with his manager did not sign the 'offer to purchase' in the presence of the appellant. As such there was no way the appellant would have known that the 'duly authorised manager' signed and/or that the respondent accepted the offer. The evidence in this instance indicates that the appellant was not aware of the acceptance neither does the evidence establish that the acceptance was ever brought to the appellant's knowledge. My view is that for the acceptance to have been communicated to the appellant he should have been

provided with a copy of the 'offer to purchase' duly signed by or on behalf of the respondent. In short, a copy of the 'offer to purchase' which was signed by Bouwer and Andries should have been furnished to the appellant. This was not done and in my opinion the acceptance was not communicated to the appellant. I therefore have to conclude that the acceptance did not come to the knowledge of the appellant.

[26] The appellant also contends that if it can be found that the offer was accepted, that such acceptance was done after he terminated the offer. The issue raised by the appellant is that at the time he terminated the offer – when he was given a defective motor vehicle, the respondent had not accepted the offer, that is, the 'offer to purchase' had not been signed by the respondent. However, the respondent's version is that the 'offer to purchase' was already signed at that time. According to Bouwer, it was signed on 27 November 2009. Since I have already concluded that the respondent's acceptance of the offer was not communicated to the appellant, I conclude as well that at the time the appellant terminated the offer it had not been accepted. The acceptance had not come to his knowledge because it had not been communicated to him.

[27] Where a method of acceptance of an offer has been prescribed, compliance therewith can be validly circumvented only by a successful argument of a tacit waiver of the prescribed method. See *Law v Rutherfurd* above[5]

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5 at 263

[28] From his conduct, it can be argued that the appellant had tacitly and unilaterally agreed to disregard writing as a form of acceptance of the 'offer to purchase'. He paid the full purchase price – the deposit and the balance - and was ready to take delivery of the motor vehicle even though he was not aware whether the respondent has signed the offer to purchase or not. He was stopped in his tracks only by the fact that the motor vehicle was defective at the time of delivery. If the motor vehicle had been in good condition he would have proceeded with the transaction. However, in the circumstances of this case, full performance by the appellant cannot in my view be regarded as compliance with the prescribed formalities. A court can still declare such agreement invalid for lack of compliance with the self-imposed formalities. In this regard see *Goldbaltt v Freemantle*[5] where the court declared an agreement invalid even though the offeror had already started to supply the goods which formed the subject matter of the agreement.

[29] A further challenge is that, in this instance, tacit waiver was neither pleaded nor canvassed at the trial, that is, no evidence was furnished to establish the waiver of the prescribed method of acceptance. Thus the respondent cannot avail itself of this defence. The rule is that the person who alleges waiver bears the *onus* to prove that the right holder, with full knowledge of his or her right decided to abandon it. See *Law v Rutherfurd* above and *Palmer v Poulter*[6].

[30] The consequence of failing to comply with the prescribed method of acceptance is that no agreement comes into existence. It is said that prescribing writing as a

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5 1920 AD 123

6 1983 (4) SA 11 (T) at 20D

method of acceptance is the same as imposing writing as a formality (self-imposed formality) as both go to the validity of the agreement – non-compliance of both results in the agreement being void. If writing is prescribed it means writing has been imposed as a formality because if an offer is not accepted in that manner no agreement comes into being. See *Goldbalt v Freemantle* above.

[31] An offer may be revoked or amended freely at any time before the agreement is concluded as such the appellant was entitled to terminate the offer. In the premises I conclude therefore that no valid agreement of sale came into existence.

IS THE APPELLANT ENTITLED TO THE RELIEF

[32] Counsel for the appellant submitted in argument that the appellant's cause of action is based on restitution or repayment of performance in the light of the unsigned agreement alternatively on *condictio indebiti.* He relied in this regard on the following authorities, the unreported Cape High Court judgment in *Eloff v Dekker*[8], *Legator McKenna Inc v Shea*[9] and Amler's[10].

[33] In my view, the appellant's cause of action cannot be based on restitution or repayment of performance. Even though I am not in agreement with the trial court's finding that there was an agreement of sale between the parties, the trial court was however correct to conclude that the appellant could not base his claim on restitution because such claim has to be preceded by cancellation of an

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8 case number 1461/2006 dated 28 November 2007

9 [2009] 2 All SA 45 (SCA)

10 7ed p100

agreement. The appellant must have accepted performance and derived no benefit from such performance as well before he can claim for restitution. In this instance, it is common cause that the appellant did not accept performance. He can therefore not rely on restitution as a cause of action. See *Sacher v African Canvas & Jute Industries (Pty) Ltd*[10].

[34] The appellant's cause of action based on *condictio in debeti* is in my view correct. The appellant was obliged to base his claim for the repayment of the deposit on unjust enrichment – the *condictio indebiti*. In the circumstances of this case, condiction was the only remedy available to him. He had no claim against the respondent *ex contractu*, and as he was suing for repayment of a sum of money he obviously could not avail himself of restitution as he wanted to do. See *Akbar v Patel*[11].

[35] The argument by the respondent's counsel that the appellant could not base his cause of action on *condictio indebiti* because the payment was not made in the mistaken belief that the payment owed is unfounded. It has been held that *condictio indebiti* may also be used to reclaim performance made in terms of an invalid agreement if the invalidity thereof is due to failure to comply with prescribed formalities. It is common cause that in this instance the appellant is claiming payment of money due to failure of an agreement to comply with prescribed formalities – the failure by the respondent to sign acceptance of the 'offer to purchase' as prescribed by the offeror. In such circumstances recovery by *condictio indebiti* is allowed without enquiry whether the party claiming was aware

10 1952 (3) SA 31 (TPD) at 36A – C

11 1974 (4) SA 104 (TPD) at 106D

of the invalidity or not or whether his or her mistake was one of fact or law. See *LAWSA*[12]

[36] However, it has been held that if a plaintiff wishes to claim repayment of a sum of money paid to a defendant under an inchoate agreement, in an action founded on enrichment, he or she must aver that the defendant is unwilling or unable to carry out his or her part of the undertaking. As long as the defendant is ready and able to give effect to such an agreement, there can be no question of unjust enrichment on his part at the expense or detriment of the plaintiff. A plaintiff must therefore allege in his or her pleadings that the defendant was unwilling or unable to perform his or her side of the void agreement. See *Akhar v Patel* above[13].

[37] To my mind the appellant did indeed allege in his particulars of claim that the respondent was unwilling or unable to perform its side of the void agreement. The appellant's particulars of claim are couched like this:

"3

On or about the 27th November 2009, the plaintiff expressed his interest in purchasing from the defendant a 2005 Hilux 3 D4D Toyota Raider Bakkie for the purchase price of R189 950. Defendant refused to conclude a contract with Defendant until the full purchase price was available.

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12 First Reissue Vol 9 para 79 at p66

13 at 106H – 107A

The Defendant prepared annexure "X1" hereto but refused to sign same until the Plaintiff had the full purchase price available for payment.

5.

On the 2nd December 2010, the Plaintiff paid to the Defendant the sum of R70 000. This is confirmed by annexure "X1" hereto.

6.

On or about the 9th December 2009 the Plaintiff tendered to pay to Defendant the balance of the purchase price in the sum of R138 935-00. The Defendant failed/neglected/refused to deliver the Toyota vehicle described above to the Plaintiff, against payment of the sum of R138 935. In fact, on or about 9th December 2009, the parties discovered that the Toyota vehicle in question could not be started and therefore could not be delivered by the Defendant to the Plaintiff, even if the full price was paid."

[38] The general rule is that once a transfer *indebite* has been established, the *onus* is on the defendant to prove that the payment did not enrich him or her. See *ABSA Bank Ltd v Standard Bank of SA Ltd*[15].

[39] The respondent, in this instance, did not plead or establish at the trial that he was not enriched but he instead pleaded *rouwkoop*. Clause 6 of 'the offer to purchase' upon which the respondent relies on stipulates that:

"If a deposit has been paid by me it will be held by you until acceptance of the offer, and upon acceptance will be applied in reduction of the purchase balance. If I default and do not perform in terms of this contract, the deposit shall be forfeited to you as rouwkoop."

15 1998 (1) SA 242 (SCA) at 252F

[40] This defence cannot avail the respondent as I have already concluded that there was no acceptance of the offer which invalidated the 'offer to purchase'. It can therefore not be said that the appellant defaulted and/or did not perform in terms of the 'offer to purchase'.

[41] Therefore the appeal stands to succeed. The deposit should be returned to the appellant.

[42] Consequently, I would make the following order:

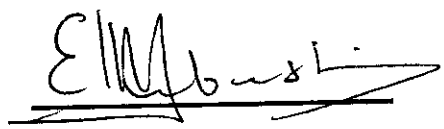
a. The appeal is upheld.

b. The judgment of the trial court is set aside and substituted with the following:

"i. The plaintiff's claim succeeds with costs.

ii. The defendant is ordered to pay to the plaintiff an amount of R70 000 with interest thereon at the rate of 15.5% *per annum* from 2 December 2009 until date of final payment."

c. The respondent is ordered to pay the costs of the appeal which costs shall include the costs of the application for leave to appeal in the trial court as well as in the Supreme Court of Appeal.



E.M. KUBUSHI

JUDGE OF THE HIGH COURT

I concur

G. BOFILATOS

ACTING JUDGE OF THE HIGH COURT

I concur and it is so ordered

T. RAULINGA

JUDGE OF THE HIGH COURT

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