IN THE NORTH WEST HIGH COURT

MAFIKENG

CASE NO.: 568/07

In the matter between:

NGATIA TRADING 103 CC t/a VERLEN MOTORS — **Plaintiff**

and

BLUE POINTER 342 (PTY) LTD t/a C A Cars — **Defendant**

CIVIL MATTER

KGOELE J

DATE OF HEARING	**:**	**19 November 2012**
DATE OF JUDGMENT	**:**	**17 January 2013**
FOR THE APPLICANT	**:**	**Advocate C. Zwiegelaar**
FOR THE RESPONDENT	**:**	**Advocate JHF Pistor (SC)**

JUDGMENT

KGOELE J:

[1] In this matter the plaintiff claims an amount of R110 000-00 from the defendant based on a contract of agency alternatively on delict.

[2] The contract and the terms thereof are not in dispute. What is in dispute are:-

- The averments by the plaintiff that the sales agent of the defendant when he accepted the cheque from the person who was buying the plaintiff's car, failed to exercise the necessary skills and diligence which was required from him in terms of the contract;
- Ownership of the car / vehicle itself by the plaintiff.

[3] The plaintiff, Mr Cornelius Vermeulen testified as follows:-

That he trades in a business of buying and selling second hand motor vehicles under the name **Vermeulen Motors**. An agreement was reached during May 2005 between him and defendant Jacques Oelofse, of Blue Pointer Trading 342 (Pty) Ltd, trading as **C A Cars,** that he can use the part of the place of business of the defendant as an office space and to place his motor vehicles on the premises for sale to the public.

[4] This agreement was subject to many terms but the ones that are relevant for consideration in this judgment are:-

- That the sales agent of the defendant, Mr Labuschagne, can sell the cars belonging to the plaintiff on his behalf, which are placed on the defendant's premises for sale;
- That commission will be paid by the plaintiff, being 10% of the purchase price on the sale of a vehicle to either the agent or the defendant, depending on who made the transaction;
- That an administrative costs of R1800-00 had to be paid to the defendant for administrative costs;
- That the money for the transaction made is to be deposited into the defendant's banking account.

[5] During June 2006 the defendant agreed with the plaintiff that the car he brought, a Corsa Bakkie, 2004 Model with Registration Number RNS 572 GP be placed at the defendant's place of business for sale. The previous owner of the said car was Mr Geyser, who bought it from his mother. The car was still on finance by ABSA bank but ABSA had already given him the settlement amount to be paid on the car. He still had to pay the settlement amount.

[6] On 16th June 2006 a client arrived and became interested in buying the Corsa bakkie. He promised to pay cash to the car. Negotiations were made with the client and the final agreement was that he will pay R110 000-00 for the car. The sales agent of the defendant Mr Labuschagne, was the one who was handling the transaction. A further agreement was made with the defendant that the amount will be paid straight to the plaintiff as this was a cash transaction and he (the defendant) will only pay 10% commission to them. The client went away promising that he will bring the cash the following day.

[7] The following day 17th, Saturday, when the plaintiff was not on duty, Mr Labuschagne phoned him and informed him that a lady from a bank had phoned asking in whose name is the cheque regarding the sale of the car should be issued by the bank. Plaintiff told him to tell them to use Vermeulen Motors name. According to Mr Labuschagne the client was not with him but with the bank.

[8] Later during the day Mr Labuschagne phoned again. This time he told him that he has a cheque from the client in his hand, and asked him whether he can release the car. He (the defendant) asked him if he was happy with the cheque. He asked him whether he verified the cheque and he replied by saying "yes". He then said to him that he can release the car if he is happy with the cheque.

[9] The plaintiff in his testimony explained that what he expected of him to do was to check with the bank whether there is money in the bank by phoning the bank and verifying that. Further that, this was a normal procedure that they usually adhere to when dealing with clients paying by a cheque.

[10] He saw the cheque for the first time on Monday the 19th. When he presented the cheque on that same Monday, it could not be honoured. The bank told him that "Payment had been stopped".

[11] He further testified that from the face of the cheque itself, one can see that it is not a bank guaranteed cheque as the bank usually write the name of the person that authorised it on it, and secondly, it has been

written “Nedbank Limited” and “on behalf of Land Bank” at the same time.

[12] He also indicated that he knew that the client was going to get money from Land Bank. He maintained that Mr Labuschagne did not act like a reasonable man as a salesperson by not verifying that it was a bank guaranteed cheque. By so doing he breached their contract. He was not supposed to have accepted the cheque. Defendant is therefore vacariously liable for the amount of the sale.

[13] During cross examination he conceded that at the time Mr Labuschagne was phoning at half past two, there was no bank that was open, so it was impossible for him that he could have verified the cheque at that time. He later said that he thought Mr Labuschagne had done that long before he received the cheque when the banks were still open. He was cross-examined at length about the appearance of the cheque, and ultimately conceded that on the face of it, it did not look irregular, that is why he also presented it on Monday for payment at the bank.

[14] The plaintiff closed its case without calling any witness. The defendant applied for absolution from the instance at the close of the plaintiff’s case. This court refused to grant the plaintiff absolution from the instance.

[15] In coming to a conclusion to refuse the application of absolution, the following established legal principles were taken into consideration by this court:-

15.1 It has been held in **Claude Neon Lights (SA) Ltd v Daniel 1976(4) SA 403 (AD) at 409 G to H**:

"…..when absolution from the instance is sought at the close of plaintiff's case, the test to be applied is not whether the evidence led by plaintiff establishes what would finally be required to be established, but whether there is evidence upon which a Court, applying its mind reasonably to such evidence, could or might (not should, nor ought t) find for the plaintiff".

15.2 In **Supreme Service Station (1969) (Pvt) Ltd v Fox and Goodridge (Pvt) Ltd 1971(4) SA 90 (RAD) at 93 H** the following cautionary remark was made in respect of applications from the instance at the close of the plaintiff's case:-

"….. I must stress that rules of procedure are made to ensure that justice is done between the parties, and so far as is possible courts should not allow rules of procedure to be used to cause an injustice. If the defence is something peculiarly within the knowledge of the defendant and the plaintiff had made out some case to answer, the plaintiff should not lightly be deprived of his remedy without first hearing what the defendant has to say. A defendant who might be afraid to go into the box should not be permitted to shelter behind the procedure of absolution from the instance …. In case of doubt at what a reasonable court "might" do, a judicial officer should always, therefore, lean on the side of allowing the case to proceed"

15.3 In that regard it has been held in **Gordon Lloyd Page & Associates v Rivera and Another 2001(1) SA 88 (SCA) at 92 J to 83 A:-**

> "….absolution at the end of a plaintiff's case, in the ordinary course of event, will nevertheless be granted sparingly, but when the occasion arise, a court should order it in the interest of justice".

[16] The defendant 's submission as far as absolution is concerned was mainly that the plaintiff in his evidence has indicated that the terms of the transaction of sale which is the subject matter of this case were different from the one pleaded by him. From his evidence the specific terms of the sale of the bakkie were still to be determined but later during cross examination the plaintiff changed to the effect that he had already made them with the defendant and his agent, *inter alia*, that the money will be paid directly to him, which was not according to the general terms.

[17] He also submitted that the plaintiff in his own evidence conceded that the defendant's agent could not verify the cheque at the time he phoned as it was after banking hours.

[18] Defendant further submitted that the plaintiff also failed to proof through his evidence that he is the owner of the motor-vehicle concerned. According to his evidence, the motor-vehicle was still financed by ABSA and there was still a balance to be settled. Under the circumstances defendant maintains that ABSA, was the owner, and not Mr Geyser nor plaintiff as he alleges. He had not right to sell the vehicle on Saturday as according to his evidence he was to pay the balance on Monday.

[19] Lastly that plaintiff also ultimately conceded that the cheque could not on the face of it look like it is not a bank guaranteed one.

[20] Defendant maintains that under the circumstances the plaintiff failed to discharge the onus that rested on him to prove a *prima-facie* case, that the defendant's agent breached the contract or alternatively did not act in a reasonable manner. The defendant should be absolved at this stage.

[21] The plaintiff on the other hand, submitted that there is a *prima-facie* case which the defendant had to answer. The defendant admitted during the pleadings that he did not verify the cheque, and therefore had to answer whether this is not breach of the agreement and a failure to act like a diligent and skilled person in his profession.

[22] Plaintiff still maintained that the plaintiff had pleaded the terms of the breach in paragraph 38 of his particulars of claim.

[23] Plaintiff further submitted that in as far as ownership is concerned, in terms of common law, ownership passes in respect of a movable property upon delivery. The car was already delivered to him by Mr Geyser and therefore the plaintiff was the owner.

[24] On the submission that the plaintiff conceded that the defendant could not verify the cheque at the time he phoned, defendant maintained that plaintiff should had done so before the bank closed as that was standard practice.

[25] The test for absolution at the close of the plaintiff's case is not the same as that at the end of the matter after both parties had closed their case. The one at the end of the matter is higher. At this point in

time the plaintiff has only to proof whether there is a *prima facie* case which calls for the defendant to answer.

[26] In this matter, the defendant in his pleadings admitted that he did not verify the cheque. It was further put to the plaintiff by the defence counsel that the defendant could not verify the cheque at the time he phoned. This therefore renders the defence of the defendant to be particularly within his knowledge. I am of the view that the plaintiff has made out some *prima case* for the defendant to answer. This is the case where this court cannot lightly deprive the plaintiff in the circumstances of this matter his remedy at this stage without first hearing what defendant had to say. I therefore leaned towards the side of the plaintiff by refusing absolution and allowed the case to proceed.

[27] Defendant, Mr Jacques Oelofse testified to the effect that he is the manager of the defendant's company. He confirmed that he had an oral agreement with the plaintiff in respect of selling his cars brought by the plaintiff to his business premises for sale. Their terms of conditions were according to the defendant a set one. He maintained that it is not true that it dependant on a particular sale. Mr Johan Labuschagne was employed by him. An agreement was also reached that he could sell the vehicles that belonged to the plaintiff. He was not allowed to make decision in respect of discounting the vehicles on behalf of the plaintiff. At that time Mr Labuschagne had been working there for +- 3 months.

[28] During the course of their business the plaintiff brought a Corsa bakkie that was put on the floor for sale. Mr Labuschagne was the one that

sold it on behalf of the plaintiff. He, (the defendant) was never at all involved in the selling of this bakkie. He was away for the weekend having left on Thursday and came back on Monday morning.

[29] Upon his arrival on Monday when asking the two about the business, he was told that the bakkie was sold. Defendant was having a cheque in his hand. Later he came to him to tell him that the cheque was stopped. At no stage did plaintiff approach him to tell him that he was responsible for the cheque until he received the summons in April 2007.

[30] During cross-examination he vehemently denied having been involved in the transaction of the sale of the Corsa bakkie and that he received anything from the sale. He denied that he agreed that the sale should not be recorded in his book this time but should go straight to the plaintiff's book.

[31] The defendant called Mr Johannes Labuschagne. He testified that during June 2006 he was working at Mr Oelofse's business. It was +- 3 months working there. He did not have any previous experience by then. He did not know about the agreement between the plaintiff and the defendant, but he was given the authority to also sell the cars that were on the floor having been brought by the plaintiff, and further that he was entitled, still, to a 10% commission for the sale of his cars.

[32] The Corsa Bakkie was there on the floor for +- two weeks. One Mr Mosia came around the 14th of June enquiring about the said Corsa. He assisted him. The following day he came again with his son and requested some discount on the purchase price as they were buying

cash. He negotiated with the plaintiff about this who then authorised that it can be sold for R110 000-0. They also indicated that they were getting money from Land Bank.

[33] On Saturday a lady from the bank phoned inquiring as to who should the cheque be made out to. He phoned the plaintiff who said it should be made in his own account's name. The customer later phoned again saying that they will be late to collect the car as his father was held up somewhere. He gave them the direction of where he stays for them to receive delivery there as the shop will be closed by the time they arrive. He phoned the plaintiff to get permission to take the vehicle to his place for delivery.

[34] Later after two o'clock they arrived to collect the bakkie. They were having a cheque. He phoned the plaintiff again and informed him about the cheque they were having. He said to him that the cheque looked fine, it is a bank guaranteed cheque. He could not verify it with the bank at that time as it was after banking hours. Upon telling the plaintiff he was happy with the cheque, the plaintiff authorised him to release the car. According to him the plaintiff never used the word, "did you verify", he only said "are you happy with the cheque". Further that, plaintiff also did not enquire whether he phoned the bank to enquire as it was already late. It was not possible for him to phone at that time. After receiving the cheque he once more phoned him to ask whether he should deliver it to him. Plaintiff told him that he will get it on Monday. On Monday plaintiff reported to him that there is a problem with the cheque. He did not accuse him at that stage that he did not check the cheque properly. He only asked about Mr Mosia's

address which he gave to him. He did not receive any commission in respect of the vehicle.

[35] During cross-examination he denied that the cheque which was handed in court as an exhibit look like a private cheque. He maintained that it looks like a bank guaranteed cheque. He further maintained that the transaction was between himself and the plaintiff, the defendant knew nothing about it. He indicated that he phoned Mr Oelofse first, but because he could not answer the phone he then phoned the plaintiff about the cheques when the person at the bank was enquiring about it.

[36] The defendant closed its case.

[37] In as far as the contractual claim is concerned, Advocate Zwiegelaar on behalf of the plaintiff argued that the defendant had admitted that the duty of care had to be carried out by the agent Mr Labuschagne when carrying out his duty of selling cars whether for him or the plaintiff. The only dispute that appear from the whole evidence is that there was such a failure by the agent.

[38] She submitted that the agent admitted in his evidence that he failed to verify the cheque. This on its own constitutes the breach of the agreement the plaintiff is alleging. He led the plaintiff to believe that he did verify. By verifying the agent was supposed to have telephoned the bank to enquire about the cheque, which the agent could have done earlier before the bank closes. Nothing prevented him from calling the bank to ask that the cheque be forwarded to him earlier on to verify. The fact that he received it after hours did not bar him to

verify. The fact that he received it late was also not pleaded by the defendant.

[39] She further submitted that when looking at the cheque itself, it is clearly not a bank guaranteed one as it is not clearly marked with the stamp of the bank to that effect, it is not signed at the back. The plaintiff acted on a misrepresentation by the agent that the cheque was a bank guaranteed cheque. The main claim should therefore succeed.

[40] On the alternative claim, that of a delictual claim, plaintiff's counsel maintained that the facts are still the same as that of the main claim and they are common between the parties. It was standard practice that payment by the cheque had to be verified first. Further that because of the nature of the services rendered by the agent, which are professional, our law and case law did not bar the plaintiff to apply for concurrent actions as argued by the defendant's counsel. She quoted several authorities in support of this,

[41] She reiterated what she said in the main claim that defendant as agent failed to exercise a duty of care. The agent admitted his negligence that he did not verify therefore the defendant is delictually liable for the actions of his agent.

[42] In as far as the issue of ownership is concerned, Mrs Zwiegelaar indicated that this court should take into consideration what she initially said in her submissions made during the application for absolution by the defendant.

[43] Advocate Pistor, Senior Counsel, on the other hand submitted that, from the evidence in court the plaintiff had given permission to the agent to release the car. Unfortunately, he had not in his pleadings said that he had been misled. On his own evidence he said that the agent did not say that it was a bank guaranteed cheque, so he was not misled. In addition to that, this submission cannot succeed as it is a submission just from the bar. One should on the same breath not forget that plaintiff had conceded during cross examination that the cheque on the face of it did not look irregular, that is why he himself presented it on Monday for payment.

[44] Counsel for the defendant further maintained that there is a conflict of factual averments between the plaintiff as against the evidence of the agent and the defendant. This court has therefore to make a credibility finding. Plaintiff bears the onus of proof in this matter. Of utmost importance is the fact that the plaintiff's counsel did not at all suggest that the evidence of the agent and the defendant should not be believed. On the other hand, the plaintiff changed his version a lot, this tainted his credibility, his evidence cannot therefore be accepted.

[45] He further submitted that Plaintiff failed to prove on a balance of probabilities that he will have acted differently or that the agent had not acted reasonably in the circumstances of this matter.

[46] Lastly that, plaintiff knew that no bank was open at the time he asked the defendant whether he is happy with the cheque. He knew that the agent was not going to be able to verify the cheque at that stage. That is why he did not query the agent over the phone as to what the bank had said about the cheque. What is important is that he gave the

agent permission to release the car nevertheless. If he did not conduct proper investigation about the verification of the cheque from the agent because it was late, he failed himself. He cannot blame the agent because of his mistake.

[47] On the issue of ownership, defendant's counsel submitted that the plaintiff cannot claim damages as if he was the owner of the car. It is common cause that the car was still in high purchase agreement at the time it was sold. Defendant had to still settle it on Monday. Clearly in law, when the cheque was presented, he was not the owner of the vehicle, as he did not acquire ownership when the vehicle was delivered to him. The bank was still the owner at that time. The averments in the pleadings are wrong, he cannot succeed on this claim. We do not have such document from the bank that ownership can be transferred to him.

[48] In as far as the alternative claim is concerned, defendant counsel quoted the case of **Lillicrap,Wassenaar and Partners v Pilkington Brothers (SA) (Pty) Ltd 1985 (1) SA 475 (A)** and briefly maintained that:-

- The plaintiff relies on the same set of facts as he relies on the main claim;
- The plaintiff had not made sufficient averments in regard to the delictual claim. He only alleged that defendant acted negligently and did not give particulars of this negligence;
- Our law does not allow such a claim if it is pure economic loss, as it does recognise delictual claim as an alternative to a contractual claim.

[49] An enquiry into negligence involve an evaluation of the defendant's conduct according to a standard that is acceptable to society. This standard is expressed, with reference to a ficticious "reasonable person" that represent society's expectations of adequate and reasonable conduct. A reasonable person therefore, does not represent a standard of exceptional skill, giftedness or care, but it also does not represent a standard of underdeveloped skills, recklessness or thoughtlessness. The reasonable person standard, must also be sensitive to a society where people have various skills, levels of intellect and are of different ages. A point to remember is that the standard is not that the harm must have been avoided at all costs and that no harm must have ensued. Rather, reasonable conduct means that a person must have acted appropriately in the circumstances, and behaved in the same way that a reasonable person would have behaved in the same circumstances. Should harm arise despite a person's reasonable behaviour, that fact does not affect the standard. The behaviour remains reasonable and that person would not be at fault. See **The Law of Delict in S.A. published in 2010 by Max Loubser and Others on page 113 and 114 paragraphs 7.5.1 and 7.5.3 respectively.**

[50] The test articulated in **Kruger v Coetzee 1966 (2) SA 428 (A)** points to four important issues that we must assess when determining whether the defendant's conduct was reasonable (and thus blameworthy for purposes of the law);

1. The first is to place a reasonable person in the same position as the defendant

2. The second is to evaluate the situation and circumstances to see whether a reasonable person in the defendant's position would have foreseen the possibility of harm arising from the conduct. If a reasonable person would have foreseen that the relevant conduct might cause harm, then we can move on to the next issue.

3. The third issue raised the question of whether a reasonable person would have done anything to prevent the harm from occurring if the conduct continued. To answer this question, we must assess what steps were available to the defendant in the particular circumstances. We do this assessing the availability of alternative steps that would have prevented harm, and whether they were reasonable and practical in the circumstances. If the defendant did in fact take some measures to prevent the harm, the plaintiff must show that such measures were either unreasonable or inadequate, with reference to what a reasonable person would have done in the circumstances. In the Kruger matter the Court noted that we must first determine what steps were available before we can assess whether a reasonable person would have taken any of the steps.

4. In the fourth instance, we compare the defendant's conduct to the course of action that the Court thinks a reasonable person would have taken in the circumstances. If it appears that the defendant did nothing, or did less than what a reasonable person would have, the defendant's conduct was 'sub-standard' and unreasonable, and therefore negligent.

[51] It is not adequate simply to state that the defendant was negligent. There must be a concrete and practical argument as to why and how the defendant was negligent in the circumstances.

[52] We cannot establish negligence unless we can prove that the harm arising from the defendant's conduct was reasonably foreseeable. We assess this after considering the surrounding (objective) circumstances. When assessing whether a reasonable person would have foreseen the harmful consequences, we should avoid applying the objective reasonableness criterion that we use for determining wrongfulness. The Supreme Court of Appeal address this problem in the case of **Minister of Safety and Security and Another v Carmichele 2004 (3) SA 305 (SCA) p 325** as follows:-

> "In considering this question [what was reasonably foreseeable], one must guard against what Williamson JA called "the insidious subconscious influence of *ex post facto* knowledge" (In *S v Mini* 1963 (3) SA 188 (A) at 196 E-F). Negligence is not established by showing merely that the occurrence happened (unless the case is one where *res ipsa loquitur)*, or by by showing after it happened how it could have been prevented. The *diligens paterfamilias* does not have "prophetic foresight". (*S v Burger* (*supra* at 879 D). In *Overseas Tankship (UK) Ltd v Morts Dock & Engineering Co Ltd (The Wagon Mound)* 1961 AC 388 (PC) ([1961] 1 All ER 404) Viscount Simonds said at 424 (AC) and at 414 G-H (in All ER):
> "After the event, even a fool is wise. But it is not the hindsight of a fool; it is the foresight of the reasonable man which alone can determine responsibility"

[53] In as far as evaluation of the evidence before this court is concerned, I fully agree with the submissions by the defendant's counsel that the evidence of the plaintiff cannot be accepted. He changed his evidence a lot. The following examples are pertinent:-

- He initially said he negotiated the terms on which the Corsa was to be sold with the defendant Mr Oelofse, even the commission,he later changed when it was put to him that Mr Oelofse was not there on Friday;

- He maintained that he paid R1800-00 as administration fee to the defendant. Later he changed and said he paid R1600-00 when cross-examined about how much the 10% commission was that he paid;

Against this, there is corroborating evidence of the agent and the defendant that: the defendant was not present when negotiations were done about the sale of the car as he had left on Thursday already; that the commission was never paid to the agent; that R1600-00 administration fee was also not paid at all. Plaintiff knew by Monday instead that the cheque was not honoured by the bank. How he could have paid the commission and administration fee to the agent when he did not receive the amount of the sale remains a mistry to me.

- He maintained that the agent did not verify the cheque, when it was put to him that the agent could not have phoned at that time to verify, he then agreed and changed his version to say that, the agent could have phoned before the cheque arrived;

- Initially he maintained that the cheque does not look like a bank guaranteed one on the face of it, but later conceded that it looked like one during cross-examination, that is why he banked it.

[54] Mr Labuschagne, the agent and Mr Oelofse, the defendant, were on the contrary honest witnesses. They steadfastly maintained what they said and were not even shaken during cross-examination. No criticism can be levelled against their evidence.

[55] The onus lies with the plaintiff to prove its claim on a balance of probabilities that the agent breached the terms of the contract, alternatively acted negligently and caused the damages the plaintiff suffered. The main question to be answered in this matter is therefore whether the agent acted in a manner different from what a reasonable man could have in the circumstances and therefore breached the terms and conditions of the contract and or caused the damages the plaintiff suffered.

[56] I do not intend dealing with the issue of ownership as submitted by both counsel as I am of the view that it is not necessary, as the other submissions can by far better disposed of the matter.

[57] In as far as the main claim is concerned, I fully agree with the defendant's counsel that the agent acted reasonably in the circumstances. He kept informing the plaintiff on that Saturday about the developments of the sale. It was not a matter of him making a decision of his own. He constantly requested permission for steps to be taken. He phoned when the lady from the bank called; he phoned again when the client informed him that he will be late; he phoned at the time of the cheque being presented to him; lastly when he wanted to deliver the cheque to the plaintiff.

[58] As correctly submitted by the defendant's counsel, we do not have evidence that LandBank is opened on Saturday until 1 o'clock. What we know is that Commercial banks usually close at 10h30 or the latest 11 o'clock. The plaintiff did not deny the fact that the defendant's business closes at 1 o'clock on Saturday. It became clear and common cause that when the client came with the cheque, it was already after one, when the bank had already closed.

[59] The argument that the agent could have phoned the bank to send him a copy and/or that he could have phoned earlier and verified are equally not good. The most insurmountable problem about these arguments is that they were not pleaded in the papers in the first instance, secondly, they were not even put to the witness when he testified. They only came during the submissions.

[60] Unfortunately we were not told in the papers nor in the evidence that what were the standard and agreed terms when dealing with a cheque that arrived late after business hours. We were only told about the terms and conditions of a cheque arriving during normal working and banking hours. We were not told that "phoning the bank to ask to be faxed a copy and again earlier on before the bank closes if it is a Saturday" are some of the normal terms and conditions of this profession. The circumstances of the arrival of the cheque in this matter are not normal ones. They are perculiar to this matter. One will have expected the plaintiff to have specifically pleaded and gave evidence about them as a basis of his claim that the agent did not act like a reasonable man. Besides, how does one verify, a document/cheque with the bank when you have not yet received and

saw it? Will this conduct amount to verification of the said document/cheque?

[61] The fact that the agent did concede that he did not verify the cheque with the bank does not assist the plaintiff in any manner. The agent maintained that he knew he should have done that under normal circumstances, but he did what he can under the circumstances which were not normal. What he did is in my view not unreasonable, is in my view not unreasonable. It is very much important to mention at this point that, later the plaintiff himself conceded that the cheque on the face of it did not look irregular or that it was not a bank guaranteed cheque, that is why he also banked it. The cheque was also handed in as an exhibit. This court had an opportunity to also observe the same. It is printed, has two signatures, it is not signed by the client himself, his account numbers does not appear anywhere or his name like with a private cheque. One cannot even classify it as a private cheque. In addition, the agent clearly stated that a lady from the bank phoned about the issuing of a cheque. This was also accepted by the plaintiff. A reasonable person under the circumstance of the agent will not have foreseen that the cheque to be issued was going to be a private one, but a bank guaranteed one. And indeed upon the cheque being presented to him, it did not on the face of it look irregular nor like a private one. He explained why to him it looked like a bank guaranteed one, and his explanation is found to be reasonable under the circumstances. Furthermore the remarks made in the Carmichele case above that “The *diligens paterfamilias* does not have a “prophetic foresight” are apposite in this matter. Furthermore these alternative steps the plaintiff claims the agent could have taken, are not reasonable and practical in the circumstances.

[62] I agree further with the submission by the defendant's counsel that whether the agent did or did not tell the plaintiff that he did not verify does not matter at all. The plaintiff knew at that time that the banks were closed. He nevertheless did not conduct further investigation with the agent as to the verification, except by saying that "are you happy with the cheque" well knowing the circumstances are not normal. It seems the plaintiff tends to forget that the onus is not on the defendant to prove on a balance of probabilities that he acted reasonably. The defendant is the one that has to discharge this onus.

[63] The agent denied vehemently that he said to the plaintiff that he had verified the cheque. The plaintiff in his alternative claim pleads that the agent misled him by saying that he verified the cheque. According to the defendant verification amongst other things entails phoning the bank and the agent also knows that. From the facts of this matter, I find it highly improbable that the agent could have said to him that he had verified the cheque at that time of the day. The defendant therefore cannot claim that he was misled by this into giving permission to release the vehicle.

[64] The alternative claim of the plaintiff is based on the same facts as the main claim although it is delictual in nature. Plaintiff in his pleadings alleges in as far as this claim is concerned that he repeats paragraphs 1-5 as well as 7 of the particulars of claim. This relates to the particulars of claim of the main claim based on contractual obligations. In paragraph 2 plaintiff only allege that the defendant's agent acted negligently and therefore committed a delict. Defendant did not at all allege a duty to act. No particularities as to the negligence is

concerned were pleaded. Therefore, there are no sufficient averments of this claim as submitted by the defendant's counsel. This court is only obliged to then rely on what was submitted by the plaintiff's counsel in the main claim. The analysis made by this court in as far as the main claim is concerned automatically applies to the alternative claim and it is not necessary to repeat same.

[65] I am also of the view that I do not have to deal with the issue of the case of Lillicrap due to the decision that I had already made in as far as the alternative claim is concerned.

[66] Consequently, I come to the conclusion that the plaintiff failed to discharge the onus rested upon him on a balance of probabilities on both the main and the alternative claim. The plaintiff's action is hereby dismissed with costs.

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A M KGOELE
JUDGE OF THE HIGH COURT

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