NOT REPORTABLE

CASE NO. I 555/2011

IN THE HIGH COURT OF NAMIBIA

In the matter between:

NAMIBIA BUILDING REPAIRS CC **PLAINTIFF**

and

MICHAEL VAN ZYL DU PLESSIS **DEFENDANT**

CORAM: **CORBETT, A.J**

Heard on: 20 September 2011
Delivered on: 21 October 2011

JUDGMENT

CORBETT, A.J: .

[1] The parties entered into a written agreement of exchange in terms whereof the plaintiff exchanged his MAN truck tractor with the defendant's Michigan Tire Dozer. In terms of a further clause in the agreement – which was

annexed to the particulars of claim - the defendant agreed to pay the plaintiff an additional amount of N$140,000.00 in instalments, and also to pay the insurance premium in respect of the Man Truck Tractor. The defendant made payment of two instalments in the amount of N40,000.00 and thereafter made no further payments.

[2] Relying upon a clause in the agreement of exchange entitling the plaintiff upon default to claim the full outstanding balance from the defendant, the plaintiff issued summons against the defendant claiming payment in the amount of N$112,600.00, together with interest and costs. The plaintiff also sought alternative relief which for the purposes of this matter is not relevant. The defendant entered appearance to defend in response to which the plaintiff brought an application for summary judgment, which was also defended.

[3] In the exchange agreement the plaintiff makes the representation that it is the registered owner of the Man truck tractor and in clause 5 thereof provides that the truck tractor will remain the property of the plaintiff until the full purchase price has been paid by the defendant.

[4] In an affidavit resisting summary judgment, the defendant claims that the MAN truck tractor is currently registered in the name of the plaintiff under a hire-purchase agreement with Bank Windhoek. He states that there is an outstanding balance due to Bank Windhoek by the plaintiff and annexes to his affidavit a

document entitled “Agreement of Surrender of Hire-Purchase Goods”. The agreement of voluntary surrender confirms that Bank Windhoek is the owner of the Man truck tractor. In terms thereof Phillipus Albertus Bredenhann, the managing member of the plaintiff, agrees to hand back the MAN truck tractor to Bank Windhoek. He agrees further that he has no claims of whatsoever nature against Bank Windhoek and that he forfeits and abandons all payments made by him as the buyer of the MAN truck tractor.

[5] The defendant states that the plaintiff never disclosed to him that the MAN truck tractor was the subject-matter of the hire-purchase agreement. He maintains that the plaintiff was not in law entitled to exchange the truck tractor whilst ownership thereof still resorted in Bank Windhoek by virtue of the hire-purchase agreement. The defendant states further that should Bank Windhoek re-possess the vehicle under the voluntary surrender agreement, he would stand to lose what he has already exchanged and paid to the plaintiff in terms of the agreement of exchange. He contends that this would form the basis of a counterclaim against the plaintiff.

[6] It was argued on behalf of the plaintiff that the defendant had failed to comply with Rule 32 (3) of the High Court Rules in that the defendant had not fully disclosed the nature and grounds of his defence and the material facts upon which he was to rely. It was further contended the defendant’s defence was not *bona fide* in that at best the defendant’s case is premised on a possibility that he

at some time in the future would become deprived of his enjoyment and possession of the MAN truck tractor. It was further argued that the defendant should have disclosed material facts explaining why he had not performed his obligations in terms of the agreement by not making payment of the purchase price by way of instalments as provided for in clause 3 of the exchange agreement.

[7] Rule 32 (3) requires that the defendant must satisfy the Court by way of affidavit that he or she has a *bona fide* defence to the action and such affidavit or evidence must disclose fully the nature and grounds of this defence and the material facts relied upon therefor. The meaning of the word "*fully*" has enjoyed judicial attention in the matter of ***Maharaj v Barclays National Bank Ltd, 1976 (1) SA 418 (A), 426*** **C – E** where Corbett JA (as he then was) said:

> "**The word 'fully', as used in the context of the rule (and its predecessors), has been the cause of some judicial controversy in the past. It connotes, in my view, that, while the defendant need not deal exhaustively with the facts and the evidence relied upon to substantiate them, he must at least disclose his defence and the material facts upon which it is based with sufficient particularity and completeness to enable the Court to decide whether the affidavit discloses a *bona fide* defence… At the same time the defendant is not expected to formulate his opposition to the claim with the**

precision that would be required of a plea; nor does the Court examine it by the standards of pleading."[1]

[8] It was contended on behalf of the plaintiff that the nature and grounds of the defence were not fully disclosed. If regard is had to the opposing affidavit, the plaintiff's argument has some force in the sense that the defendant fails to attach a label to his defence. He simply refers in his opposing affidavit to the fact that there has been a material non-disclosure, but fails to definitively state that the plaintiff has made a fraudulent misrepresentation through non-disclosure inducing the contract, entitling the defendant to cancel the contract and claim damages. [2] The defendant rather obliquely states that he stands to lose the amount paid to the plaintiff and has a counterclaim against the plaintiff.

[9] Whilst the precise nature and ambit of the defence are not fully disclosed, the same cannot be said of the facts underpinning the defence. I am of the view that the facts are fully set out should reference be had to the allegations of non-disclosure concerning Bank Windhoek's ownership of the truck tractor under the hire-purchase agreement. The defendant clearly stated that should he have been aware of this fact he would not have entered into the agreement of exchange.

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[1] Quoted with approval in the matter of *Kühn v Levey and Another, 1996 NR 362 (HC), at 364 A - B*
[2] Service v Pondart-Diana, 1964 (3) SA 277 (D) at 279 E - F

[10] The property of another may not be exchanged. [3] It could be contended that the plaintiff must have known that whilst the truck tractor was subject to a hire-purchase agreement that it could not be exchanged. Reliance could also be placed upon the circumstance that in so entering into the exchange agreement the plaintiff must also have known that he was under a duty to disclose this fact. Generally, if in the circumstances it would be wrong to keep silent, then silence amounts to a misrepresentation. This principle was considered by Conradie JA in ***ABSA Bank Ltd v Fouche, 2003 (1) SA 176 (SCA), 180 – 181 para [5]***:

> "**The policy considerations appertaining to the unlawfulness of a failure to speak in a contractual context – a non-disclosure – have been synthesized into a general test for liability. The test takes account of the fact that it is not the norm that one contracting party need tell the other all he knows about anything that may be material (*Speight v Glass and Another* 1961 (1) SA 778 (D) at 781H-783B). That accords with the general rule that where conduct takes the form of an omission, such conduct is *prima facie* lawful (*BOE Bank Ltd v Ries* 2002 (2) SA 39 (SCA) at 46G- H). A party is expected to speak when the information he has to impart falls within his exclusive knowledge (so that in a practical business sense the other party has him as his only source) and the information, moreover, is such that the right to have it communicated to him 'would be mutually recognised by honest men in the circumstances' (*Pretorius and Another v Natal South Sea Investment Trust Ltd (under judicial Management)* 1965 (3) SA 410 (W) at 418 E-F)**"

[3] Pennefather v Gokul, 1960 (4) SA 42 (N) at 45A - D

[11] I am of the view that there is merit to the argument that the information concerning Bank Windhoek's ownership of the truck tractor was in the exclusive knowledge of the plaintiff and as such would be information that should have been communicated to the defendant at the time of entering into the agreement. The argument could be advanced that it was material information which, had the defendant known about it, would on his version have persuaded him not to enter into the exchange agreement. In the circumstances, the defendant might at trial be able to establish that this non-disclosure induced the contract between the parties. This in turn could provide a basis for a defence founded upon fraudulent misrepresentation, permitting the defendant to cancel the contract and claim damages by way of a counterclaim.

[12] Despite the failure by the defendant to fully articulate the precise nature of the defence to be raised, I am persuaded that the defendant has crossed the threshold in disclosing that he indeed does have a *bona fide* defence to the plaintiff's claim. The affidavit puts up facts with sufficient particularity thereby disclosing that there is a reasonable possibility that the defence the defendant advances may succeed at trial.

[13] In the circumstances, I make the following order:

1. Summary judgment against the defendant is refused and the defendant is granted leave to defend.

2. Costs of the application for summary judgment are to stand over for determination by the trial Court.

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CORBETT, A.J

ON BEHALF OF THE PLAINTIFF:

Mr J P Ravenscroft Jones
Instructed by
Neves Legal Practitioners

ON BEHALF OF THE DEFENDANT:

Adv. I Visser
Instructed by
Van der Merwe-Greeff Inc.