NOT REPORTABLE

CASE NO: I 702/2010

IN THE HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

In the matter between:

GERT MULLER **PLAINTIFF**

and

JOHANNES FERDINAND SNYDEWEL **DEFENDANT**

Neutral citation: *Muller v Snydewel (I 702/2010) [2013] NAHCMD 162 (13 June 2013)*

CORAM: **Smuts, J**

Heard on: 24 May 2013, 3-4 June 2013

Delivered on: 13 June 2013

Flynote: Contractual claim for repudiation alternatively enrichment in the event of the contract found to be illegal in and conflict with s6(4) of the Credit Agreements Act, 1980. The court found that both requisites in s6(4) must be present before illegality arises. The court found that the disputed agreement was a sale agreement and that it was repudiated and awarded damages.

ORDER

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[1] That the judgment for the plaintiff in the amount of N$53 400 together with interest on that sum at the legal rate from date of service of the summons to date of final payment plus costs of suit.

JUDGMENT

Smuts, J

1.1.

[2] The plaintiff and defendant entered into an oral agreement in July 2007 in respect of a Citroen C2 motor vehicle which was then, in the defendant's possession and the subject of an instalment sale agreement which he was in the process of acquiring by way of instalments through First National Bank. The parties differ as to the nature of the agreement they concluded. The plaintiff alleges in his particulars of claim and in his evidence that it was a sale agreement. The defendant however denied this and contended both in his plea and in his evidence that it was a use agreement. In this claim, the plaintiff

alleges that the defendant repudiated the agreement contended for him and claims damages in the sum of N$57 657,88. In the alternative, the plaintiff claims the same sum by way of enrichment. The defendant denies both claims and instituted a counterclaim which was abandoned at the trial. At issue in this trial is the nature of the agreement and whether the plaintiff is entitled to damages or enrichment.

The pleadings

[3] The oral agreement contended for by the plaintiff was a sale agreement in terms of which the defendant sold the motor vehicle for the sum of N$60 000 which was payable by way of a deposit of N$30 000 on the date of the agreement and that the parties would secure the consent of the defendant's bank for the replacement of the defendant's name with that of the plaintiff who would then continue to pay the balance by way of monthly instalments of N$2 130 payable in terms of the defendant's instalment sale agreement with First National Bank. Delivery was to take place on the date of the sale, namely 23 July 2007 and that the defendant would on that date secure the consent of his bank manager to the agreement and the replacement of his name with that of the plaintiff as hire purchaser. The plaintiff alleged that he had complied with his obligations under the agreement and had requested the defendant to secure the consent of the latter's bank manager to the agreement. When this had not occurred by 8 February 2008, the plaintiff demanded receipts for past payments he had already made and was on that date provided with separate receipts for the payments he had made. The plaintiff further alleges that the defendant

provided the plaintiff with the bank account details in respect of the hire purchase agreement so that the plaintiff could attend to the further instalments directly with the bank.

[4] The plaintiff further alleged that the defendant unlawfully repudiated the agreement by repossessing the vehicle in or about August 2008. The plaintiff alleged that he accepted the repudiation and claimed damages in the total sum of N$57 657, 88 representing the total instalments in the sum of N$54 430 and repairs on the vehicle in the sum of N$4 227,88 paid by the plaintiff.

[5] The plaintiff also claimed the same sum by way of enrichment in the event of it being found that the agreement was null and void and unenforceable by virtue of being in conflict with s 6(4)(a) and (b) of the Credit Agreement Act, 75 of 1980 ("the Act"). In this regard the plaintiff contended that he was unaware that the agreement may have constituted a contravention of that Act and was unaware of the provisions in question and of any possible illegality which may arise as a consequence.

[6]

[7] In the defendant's plea, he denied the nature of the agreement contended for by the plaintiff. He admitted receiving the payments referred to but denied that he had agreed to seek the plaintiff as his replacement in the instalment sale agreement and contended instead that the agreement was for the use and enjoyment of the vehicle. As a consideration for that use and enjoyment the defendant alleges that the plaintiff made the payment of N$30 000 as well as paying all subsequent monthly instalments on the vehicle and

would also pay for the repairs and maintenance costs of the vehicle whilst in his possession. The defendant further contended that in the event of default in paying instalments, the plaintiff would be required to surrender the vehicle to the defendant and that arrear instalments would become due and payable. The defendant further alleged that the plaintiff would have a right of first refusal should the defendant wish to sell the vehicle during the subsistence of the alleged use agreement. The defendant thus denied the repudiation and the damages and stated that the plaintiff approached him and said that he was unable to continue with the agreement and the parties agreed that it would be cancelled and that the plaintiff thus voluntarily returned the vehicle to the defendant.

[8] The defendant instituted a counterclaim for certain repair and other costs incurred after the return of the vehicle. This claim was however abandoned during the hearing of the matter by the defendant's counsel, Mr Boesak on his behalf and thus merits no further mention.

[9]

[10] **The evidence**

[11] The plaintiff and his wife gave evidence in support of his claim whilst the defendant testified in support of his position.

[12] It was common cause that the defendant had effected certain improvements to the home registered in the name of the plaintiff's wife. The plaintiff however alleged that the defendant, overhearing a discussion of the

plaintiff and his wife concerning the acquisition of motor vehicles, offered his Citroen motor vehicle for sale to them. The plaintiff testified that he and the defendant reached an oral agreement in the terms set out in his particulars of claim and referred to above. He confirmed that he took possession of the vehicle but that the defendant's bank manager was not available at the time to effect the replacement in the instalment sale agreement they had agreed upon. Nor was the bank manager, according to him, available in August 2007, as told to him by the defendant. The latter informed the plaintiff that the bank manager was abroad and not available at the time. The defendant however kept up the monthly instalment payments and paid these in cash directly to the defendant.

[13] The plaintiff further testified that in February 2008 he and his wife were concerned about the fact that the vehicle was not registered in the plaintiff's name and that he did not he have any receipts for his payments. The plaintiff gave evidence that he and his wife then proceeded to the defendant's home to seek receipts of the payments made to date and to again demand that the plaintiff that the bank manager be prevailed upon to effect the replacement agreed upon. At the meeting in February 2008, the plaintiff said that the defendant provided receipts to him in respect of all of his payments made up to that date, including the initial deposit of N$30 000. He further testified that the defendant provided him with the bank account details into which the further instalments should be paid so that his further deposits into that account would then constitute proof of those payments.

[14] The plaintiff continued paying the monthly instalments but subsequently

realised that there was not a branch of First National Bank in the Gustav Voigts Centre (but a branch of Standard Bank), which is where the defendant had headed at the time of their agreement for the purpose of approaching the bank manager. He then became suspicious and made enquiries at First National Bank, but was advised by a teller that further information could not be provided to him over the counter but was directed to the head office of First National Bank's division in respect of instalment sales.

[15]

[16] In June 2008 he was referred to that bank's offices at the Swabou Building in Windhoek West. He proceeded to those premises and was informed by an official of the bank who was an ex-police officer in the commercial branch that the vehicle was not in his name as yet. He then proceeded to the defendant's house on the following day and asked several questions as to why he had not gone to the bank and why the vehicle was not yet in his name. An argument soon developed and he said the defendant said to him that he was stupid and told him with the use of profanities to leave his premises. He further testified that the defendant summoned the City Police and that he thereafter left. He however made a further instalment because he was concerned about running into legal difficulties.

[17]

[18] The plaintiff further testified that the defendant thereafter demanded the return of the vehicle and that the plaintiff as a consequence tendered its return. The plaintiff further stated that he had received a letter addressed to him on the defendant's behalf from the defendant's erstwhile legal representatives. Although the letter was styled "without prejudice" it was common cause between

the parties that it plainly did not contain any settlement offer and that this heading was wrongly given to this letter. This letter is of considerable importance to this matter. I propose to quote certain portions after the introductory section which merely referred to the firm in question acting on behalf of the defendant. The letter proceeded to state:

> 'Without entering into the details of the matter, we record our client entered into an oral agreement with yourself, in terms of which he delivered one Citroen C2 motor vehicle in return for a deposit of N$30 000 from yourself and secondly payment of the monthly instalments until the full loan had been settled by you.
>
> Once the hire purchase agreement has been settled by yourself our client will register the vehicle into your name.
>
> It is now our instructions that you tender return of the vehicle, the exact terms of the tender unknown to our client. On that basis and in the premises, we record that client shall take delivery of the vehicle without prejudice to any of his rights and considers your action as a repudiation of the oral agreement, which repudiation our client will calculate as damages suffered and institute action for same against yourself, once computated.'

[19] It was then common cause that the defendant subsequently collected the vehicle in a parking garage where the plaintiff had left it for him.

[20]

[21] The plaintiff was subjected to extensive cross-examination, primarily focussed on the areas where his version differed from that of the defendant as

was reflected in the pleadings. He was also asked about his position as a security officer. He was at the time in the employ of Namdeb and that his work was to observe sorters and to travel to the airport to accompany diamond shipments. When it was put to him that he should have known that there was not a branch of First National Bank in the Gustav Voigts complex, he stated that the Namdeb security employees were not permitted to go to the Kalahari Sands Hotel or the Safari Court Hotel because his employers stated that these places were frequented by illegal diamond dealers. Mr Boesak put to him that this was highly improbable and questioned him about who had given the instructions and more particulars concerning them. The plaintiff provided the necessary details and pointed out that the supervisor in question was no longer in Namibia and had been transferred to other operations of his employers to Botswana.

[22]

[23] The plaintiff was also asked about whether he previously purchased the motor vehicle and it was put to him that he would have known that a party would not be able to sell a motor vehicle which was subject to an instalment sale agreement through a financial institution. He replied that he had thought that the agreement was legal and that the defendant was able to sell the vehicle and transfer it to him with the assistance or consent of his bank.

[24]

[25] It was also put to him that he needed the motor vehicle urgently and was prepared to pay N$30 000 for the use of the vehicle. It was put to him that he needed it to travel to Otjiwarongo. He denied this and stated that he had no business in Otjiwarongo and did not know the place and had not travelled there. He denied that the N$30 000 payment was used as a form of persuasion or

inducement to the defendant to secure the use of the vehicle. He stated that he had continued to make payments even though the vehicle had not been transferred into his name because he trusted the defendant and was confident that he would secure the transfer of the vehicle into his name with the assistance of the bank manager in question.

[26]

[27] The plaintiff was also questioned as to why he had delayed making further enquiries after being informed by a bank teller that the information was not available to him. He stated that he did not always have sufficient time off to do so, given his hours as a security officer. He also stated that he had at that stage still retained trust in the defendant.

[28] It was also put to the plaintiff that the defendant denied that his wife had accompanied him to the defendant's home in February 2008 when receipts were requested and provided. The plaintiff reiterated his position and after his evidence was completed, his legal representative, Mr Hohne, requested that the matter stand down very briefly for the purpose of calling the defendant's wife on that very confined aspect. It was clear that the plaintiff had not previously intended calling his wife. Her name had not been provided as a witness in the course of case management. Nor had any statement been provided for her.

[29] The matter stood down very briefly and the plaintiff's wife was called. She testified that she did accompany the plaintiff to the defendant in February 2008 and that the receipts were sought and were provided by the defendant. Her evidence corroborated that of the plaintiff concerning that event. Her cross-

examination however went considerably wider. She was cross-examined about the material respects upon which the plaintiff's evidence differed from that of the defendant. Although she was not present on those occasions and could thus not give direct oral evidence as to certain events, her evidence as to what was stated to her by the plaintiff corroborated his version fully in most material respects. It was then put to her that she had discussed her evidence with the plaintiff when he had collected her from work and brought her to court to give her evidence. But her answers on this issue were satisfactory. It was also clear to me that it was unexpected that she would be called and it certainly was not possible in the short adjournment for her to be coached by the plaintiff or anyone else for that matter as to her evidence and answers to the very wide ranging cross-examination which ensued. She also created a very favourable impression as a witness and struck me as credible.

[30] The plaintiff's case was then closed.

[31]

[32] The defendant then proceeded to give evidence. He confirmed the written statement provided beforehand which was read into the record. He confirmed that he had acquired the motor vehicle by way of an instalment sale agreement through First National Bank. He said that the price of the vehicle when he had purchased it, was N$117 000. He purchased it in March 2007. At the time of the agreement, he said that the outstanding balance was approximately N$101 000.

[33] The defendant insisted that the agreement was one for the use and

enjoyment of the motor vehicle and that the N$30 000 was given to him by the plaintiff as a consideration for that use and enjoyment. He further stated that the defendant urgently needed a vehicle to proceed to Otjiwarongo.

[34] The defendant further stated that the plaintiff would retain the use and enjoyment of the vehicle as long as he continued to pay the monthly instalments which were payable under his instalment sale agreement with First National Bank. He denied that the plaintiff's wife accompanied him to the meeting in February 2008. He said that he had never seen the plaintiff's wife before and they did not attend at his home on that date.

[35] The defendant also testified that he had informed the plaintiff at the time when they entered into the oral agreement that he was not able to sell the car to him as it was the subject of an instalment sale agreement with First National Bank. He also indicated that he had shown a copy of the instalment sale agreement to the plaintiff. When cross-examined on this issue he conceded that a copy of the instalment sale agreement had not been discovered and that he did not know of its whereabouts. He denied that the plaintiff would have had any difficulty in knowing his whereabouts from August 2007 onwards for a while even though he conceded that he did move home during that period from Academia to Rocky Crest. He was however evasive when questioned as to when he had seen the plaintiff after they had entered into the agreement.

[36] As for the confrontation which occurred on or about 21 June 2008 he confirmed that the plaintiff had come to his home and that they had discussed

the agreement. He however stated that the plaintiff had indicated that he could not continue with the instalments and wanted to return the vehicle and wanted his deposit back. He stated that he informed the plaintiff that he would need to consider the condition of the vehicle and the costs of any repairs before he could consider repayment of the deposit. He was unable to explain why this should occur in view of his prior evidence that the N$30 000 was part of the consideration for the use of the vehicle. He however confirmed that an argument ensued and that he did in fact summon the City Police and requested them to have the plaintiff removed from his premises. He confirmed that he did use abusive language towards the plaintiff although denied calling him stupid.

[37] The defendant confirmed that he had collected the motor vehicle on 2 September 2008. He also confirmed that the letter which the plaintiff had referred to in his evidence had been sent upon his instructions by his erstwhile legal practitioners. He was however unable to explain why his erstwhile legal representatives would have stated that the vehicle would be registered in the name of the plaintiff once all the instalments had been paid. It was put to him that this was more consistent with a sale agreement than with one for use or rental of the vehicle. He was also evasive when asked about why he would consider paying the balance of N$30 000 back to the plaintiff after repairs had been effected. He insisted that the N$30 000 payment was a consideration for the inconvenience occasioned to him by giving up the vehicle and making it available to the plaintiff. He also insisted that it was never his intention to sell the car to the plaintiff and that he could only do so if he had paid off all the instalments. The defendant was also evasive as to the communications which

preceded his repossession of the vehicle.

[38] The overall impression of the defendant as a witness was one of evasiveness and one who was prepared to adapt his version according to circumstances. He did not impress me as a witness. His demeanour in court under cross-examination also did not create a good impression – long pauses which preceded evasive answers and some answers given with extra-ordinary and unusual vehemence. The plaintiff on the other hand, was not evasive and appeared credible to me. I accordingly accept the version of the plaintiff and his wife where the defendant's evidence conflicted with it. The plaintiff's version also in my view is more consistent with the probabilities.

[39]

Submissions by the parties

[40] Mr Hohne on behalf of the plaintiff submitted that the plaintiff had established his main claim, but in the event of a finding that the agreement was tainted by illegality, he submitted that the plaintiff should succeed under the *condictio ob turpem vel iniustam causam*. He submitted that the plaintiff had proceeded in the *bona fide* belief that he was entering into a valid agreement of sale with the defendant and argued that there could be illegality of part of that agreement. He submitted that the plaintiff had performed in part and could now reclaim that performance under the *condictio* relied upon. It is submitted that the defendant had been enriched to the extent of the plaintiff's payments. I however queried him on the plaintiff's use of the vehicle during the period and questioned whether a value should be attached to that which should be

subtracted from the payments made to the defendant. He was unclear on that issue as there had been no evidence on the value of the use during the period in question.

[41] Mr Boesak argued on behalf of the defendant that the defendant's evidence should be accepted that it was a use agreement. He argued in the alternative that insofar as the agreement may appear to be a sale agreement, it was illegal. He supplemented his argument with subsequent written argument on this issue. He submitted that the agreement was in conflict with s 6(4)(a) and (b) of the Act. This subsection provides:

> '(4) No person shall be a party to a credit agreement or any other agreement or document in terms of which or which has the effect that-
>
> (a) an earlier credit agreement is cancelled and substituted by a later credit agreement in terms of which the goods or service, or any part thereof, to which that earlier agreement relates, and any other goods or service, are sold, rendered or leased to the credit receiver concerned; and
>
> (b) any money or other consideration paid or delivered in terms of that earlier credit agreement to the credit grantor concerned, shall serve as an initial payment or as initial rental in respect of the goods or service to which that later credit agreement relates.'

[42] He submitted that if I were to find that the agreement was a sale agreement in accordance with the plaintiff's evidence, then it fell foul of this

provision and, being in conflict with a pre-emptory statutory provision, it would then be a nullity and unenforceable.

Analysis of submissions and evidence

[43] It would seem to me that Mr Boesack's argument is based upon an understanding that the parties had acted in conflict with subparagraph (a) of this subsection because the further agreement would have had the effect of cancelling or substituting the credit agreement in respect of the motor vehicle which was subject to an instalment sale agreement. This submission however overlooks the use of the conjunctive "and" between the two subparagraphs. This would mean that not only would the jurisdictional facts in subparagraph (a) need to be present but also those in (b) for the agreement to be tainted by illegality. Both must be established. The effect set out in sub-paragraph (b) did not arise in this case.

[44]

[45] This subsection would thus in my view to be inapplicable to the present circumstances. It would rather relate to a prohibition for people entering into an agreement which has the effect of an earlier credit agreement being cancelled and substituted by a later one in terms of which the goods to which the earlier contract relates are sold and any payment or consideration made in terms of the first agreement is then used as a deposit in terms of the second. This is in accordance with the ordinary grammatical meaning of this section. The interpretation also accords with the way in which it has been understood by commentators. [1] The learned authors make it clear that what the legislature

[1] Joubert: The Law of South Africa 1st reissue Vol 5 Part I par 21.

prohibits in this subsection is the use of deposits and instalments made in respect of the first item being used in respect of the purchase of a second as it would permit people who are not in a position to pay a deposit on every item which they wanted to buy, to enter into a chain of agreements which could result in them not being able to afford the subsequent instalments. Thus, what the legislature requires is that separate contracts must be concluded in each sale and that contracts cannot be consolidated in the way the subsection. As the learned authors point out, this prohibition is directed at the person entering into the agreement rather than the contract itself.[2]

[46] As the legislature provides that a person entering into such an agreement commits an offence, I agree that any agreement in conflict with this subsection would be void and unenforceable by virtue of being illegal. But, as I have indicated, the facts in question do not render this section applicable.

[47]

[48] Mr Boesak did not refer to any other sections in the Act in support of the claim that a sale agreement as contended for by the plaintiff would be illegal. Whilst it is clear that the agreement was not reduced to writing as required by s 5 of the Act, s 5(2) expressly provides that a credit agreement not complying with this requirement as well as the other requirements specified in s 5(1) would not be merely be invalid for that reason.

[49] I accordingly find that the agreement entered into does not fall within the prohibition contained in s 6(4) relied upon. As no other provision in the Act was relied upon for the illegality of the agreement and being unable to find any other

[2]Supra at par 21.

provision which would render it illegal and unenforceable, I decline to do so.

[50] Having accepted the evidence of the plaintiff and rejecting that of the defendant where it conflicts with his, I find that the agreement entered into between the parties was one of sale as contended for by the plaintiff. This is also supported by the letter addressed to the plaintiff by the defendant's erstwhile legal practitioners I have quoted above and is consistent with the probabilities.

[51] By demanding the return of the vehicle in the circumstances set out above, the defendant furthermore repudiated the agreement and the plaintiff was entitled to accept that repudiation and cancel the agreement and claim his damages. As often arises upon eviction a purchaser would ordinarily be entitled to his full *interesse* and the purchase price is taken as a basis for those calculations. [3] It is not clear to me that the plaintiff would be entitled to the repair costs referred to which were in any event not properly supported by evidence, as was pointed out by Mr Boesak. There was no conditional counterclaim by the defendant in respect of the use of the vehicle.

[52] I according found that the plaintiff is entitled to a repayment of the amounts paid pursuant to the purchase price including the subsequent instalments. These amounts to N$53 400.

[53]

[54] The plaintiff is also entitled to the costs of suit. I therefore make the

[3]Visser and Potgieter: Law of Damages (2d, 2003 at 332 and the authorities collected there).

following order:

[55] Judgment for the plaintiff in the amount of N$53 400 together with interest on that sum at the legal rate from date of service of the summons to date of final payment plus costs of suit.

[56] _____

DF Smuts

Judge

APPEARANCES

PLAINTIFF:	I.V.T Hohne
	Instructed by Tjitemisa & Associates
DEFENDANT:	W. Boesack
	BD Basson Inc.