

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: HC-MD-CIV-ACT-CON-2019/04660

In the matter between:

NEW POINT ELECTRONIC SOLUTIONS (PTY) LTD

PLAINTIFF

and

ZIMMERMANN GARAGE (PTY) LTD

DEFENDANT

Neutral citation:

New Point Electronic Solutions (Pty) Ltd v Zimmermann Garage (Pty) Ltd (HC-MD-CIV-ACT-CON-2019/04660)
[2022] NAHCMD 1 (6 January 2022)

Coram:

TOMMASI J

Heard:

6 September – 10 September 2021

Oral Submissions:

21 September 2021

Delivered:

6 January 2022

Judgment released

10 January 2022

Flynote: Contract – fictional fulfilment – plaintiff has legal duty to assist the condition being fulfilled – where it deliberately and in bad faith prevents the fulfilment of the condition in order to escape the consequence of the contract, the law will consider the unfulfilled condition to have been fulfilled as against the person guilty of bad faith (See *Koenig v Johnson & Co Ltd 1935 AD 262*, at page 272).

Contract – Conditional Contract – non fulfilment of condition precedent – lapsing of contract – if party partially performed in terms of the agreement that party is entitled to be refunded unless contract provide otherwise.

Summary: The plaintiff signed two identical offers to purchase two Volkswagen Touareg (Touareg) vehicles from the defendant which was accepted by the defendant. The contract was conditional and was dependant on the fulfilment of conditions by the plaintiff. The plaintiff partially performed in terms of this contract and paid a deposit in the sum of N\$250 000. The plaintiff claimed non fulfilment of the conditions precedent and claimed a refund of the deposit as the contract had lapsed and was void *ab intio*. Held: that the plaintiff did not deliberately and in bad faith fail to fulfil the conditions precedent.

Held: that the contract was conditional and the conditions precedent were not fulfilled.

The agreement therefore had lapsed and the partial performance in the form of a deposit ought to be refunded unless the contract provides otherwise.

Held: further that the contract provides the legal basis for deduction of charges and that the defendant herein had proven that the charges were incurred and that same were reasonable. Such charges exceed the deposit paid and the plaintiff is thus not entitled to be refunded.

ORDER

1. The plaintiff's claim is dismissed.
2. Each party to pay their own costs.
3. The matter is removed from the roll and regarded as finalised.

JUDGMENT

TOMMASI J:

[1] The plaintiff is a private company doing business as a software specialist and the defendant is a motor dealer. The plaintiff signed two identical offers to purchase two Volkswagen Touareg (Touareg) vehicles from the defendant and paid a deposit in the sum of N\$250 000. The offer was accepted and signed by the defendant on 26 May 2017. The vehicles were secured but the plaintiff did not pay the remaining balance of the purchase price. The plaintiff now claims repayment of the deposit in terms of the provisions of the offer to purchase together with interest and cost of suit.

[2] The following are facts not in dispute. The plaintiff and the defendant signed two documents titled "Offer to Purchase" in respect of two Touareg vehicles. The parties agreed that both these documents constitute agreements and that it came into effect on the same day i.e. 26 May 2017. Plaintiff was represented by Mr Ortmann and Mr Zimmermann signed on behalf of the defendant. The first offer to purchase was for a pure white Volkswagen Touareg for the sum of N\$1,053,715.50 and the second for a canyon grey metallic Volkswagen Touareg for the sum of N\$1,227,860.00.

[3] The material terms of both offers/agreements are exactly the same. The parties were *ad idem* that the following are the material terms:

'Paragraph 2.2 (b) - I (*plaintiff*) confirm that the offer will lapse if I am not able to provide satisfactory proof of my ability to pay for the vehicle or written approval or guarantee of financing by a registered credit provider within fourteen days of the offer or any extension given by you (*defendant*).

Paragraph 3.3 (b) - If I (*plaintiff*) have paid a deposit then I will be refunded the deposit if this offer lapses or is cancelled in terms of paragraph 8 less any reasonable charge you (*defendant*) are legally entitled to deduct.

Paragraph 8.1 – If after acceptance of this offer by you (*defendant*), I decide not to proceed with the purchase, I acknowledge that you may be legally entitled to a reasonable cancellation fee taking into consideration the costs incurred by you.’[my insertions in italics)

Plaintiff's case

[4] The plaintiff avers that he was not able to provide satisfactory proof of his ability to pay the remaining purchase price and neither was he able to provide the defendant with a written approval or guarantee of financing by a registered credit provider within fourteen days as was required in terms of paragraph 2.2.(b) of the contract. He alleges that the offer had lapsed and was void *ab initio*. He claims that the defendant has been enriched and he has been impoverished in the amount of N\$250 000. He further claims in the alternative that he cancelled the agreement and the defendant is liable to repay the deposit in terms of paragraph 8.1 of the contract.

Defendant's case

[5] The defendant denies that the agreement lapsed and denies that the plaintiff was unable to provide satisfactory proof of its ability to pay for the vehicles and if it was indeed unable to provide satisfactory proof of its ability to pay, then in that event the defendant pleads that such inability was due to plaintiff's intentional frustration of the fulfilment of this condition and the condition must be regarded as fulfilled.

[6] The defendant further pleads that the plaintiff was not entitled to withdraw from any offer to purchase if the offer relates to a unique vehicle which has been manufactured to meet the plaintiff's specific requirements.

[7] Alternative to the above, the defendant pleads that if it is found that the plaintiff was entitled to withdraw from the offers or that same has lapsed, that the reasonable cancellation fee in respect of the two agreements amount to N\$38 000 for finance charges for 4 months in respect of the white Touareg, finance charges of N\$161 500 in respect of the grey Touareg; and discounted price at which the vehicles were sold amounting to N\$99 888.

Plaintiff's evidence

[8] The managing director of the plaintiff, Mr Ortmann testified on behalf of the plaintiff and what follows is a summary of his testimony. The plaintiff, represented by Mr Ortmann, approached the defendant for the purchase of Touareg vehicles and spoke to a salesperson, Mr Amuphadi who explained that there was a substantial waiting time for the Touareg vehicles the plaintiff wanted to purchase. He did not want to wait that long and Mr Amuphadi undertook to see if he could source the vehicles from South Africa. Mr Amuphadi found two vehicles available and gave the specifications as stipulated in the two contracts. He evaluated the specifications and found them to be acceptable. His only request was that both vehicles should include a full size spare wheel. He did not want anything unique. He was advised that he should pay a deposit of N\$250 000 in order for Mr Amuphadi to secure the two vehicles. He paid this amount on 26 May 2016. He also attended to the offices of the defendant to sign the two offers to purchase.

[9] He explained why plaintiff was not able to provide proof of its ability to pay the purchase price. During July 2016 the plaintiff entered into a lucrative contract to the value of N\$27 million giving plaintiff a monthly income of N\$150 000 in support and maintenance and a further payment of N\$3 million every 4 months, with an estimated 20% profit margin. A dispute however arose in respect of this contract and it caused the suspension of payments. The last payment the plaintiff received in terms of this contract was at the end of March 2017. Plaintiff fully expected the dispute to be resolved but it was not successful. The suspension of payments caused a cash flow problem which became acute during June/July 2017. The plaintiff was thus not in a position to pay the

full purchase price of the vehicles. Mr Ortmann testified that the plaintiff never intended to pay cash for the vehicles but intended applying for vehicle financing from the outset.

[10] It was further Mr Ortmann's testimony that, directly after signing the agreements, he applied for financing at Wesbank, a division of First National Bank. He was unable to recall the exact date he applied. He was required to submit management accounts of the plaintiff. He duly instructed the auditors to prepare the required accounts which were forwarded to him on 21 June 2017. He in turn forwarded the accounts to Wesbank. Wesbank further required a full audit report and he once again instructed his auditors to prepare the full audit report. During August 2017 Mr Amuphadi enquired from Wesbank what the progress was. He was informed that the applications were in the "referencing phase". He received the audit reports on 13 September 2017 and submitted it to Wesbank. Wesbank however never refused but also did not give a written approval. During cross examination he however testified that he was orally informed that the application was declined by Wesbank.

[11] During October 2017 plaintiff applied for vehicle finance at Bank Windhoek. Mr Amuphadi was aware of this application as well. This application was orally declined.

[12] Plaintiff decided not to proceed with the purchase of the vehicles and on 7 May 2019 Mr Ortmann directed a letter to the defendant demanding repayment of the deposit of N\$250 000. The defendant on 9 May 2019 by return mail claimed that the deposit was non-refundable. He wrote a letter in response hereto on 15 May 2019 challenging the stance of the defendant.

Defendant's evidence

[13] Mr Amuphadi and Mr Zimmermann testified on behalf of the defendant. Mr Amuphadi is a Sales Executive of the defendant. A summary of his testimony follows below. He was approached by Mr Ortmann during May 2017 who wanted to buy two Volkswagen Touareg vehicles from the defendant. Mr Ortmann did not want to wait long for the vehicles and he immediately started searching the Volkswagen system and

found two vehicles available for order within the timeframe anticipated by the plaintiff. These vehicles were luxury vehicles which had “extras” and are custom built according to a client’s needs. The white Touareg was fitted with an advanced safety package and a travel and adventure package. The factory fitted options for the grey Touareg were an electric luggage compartment, air suspension, an advance safety package, a navigation system and a Dynaudio sound system.

[14] According to this witness, these vehicles are not generally ordered by the defendant and kept in stock, they are specifically ordered for a client who wants to buy same and pays a deposit to secure the sale. These vehicles do not sell as fast as the less expensive vehicles and they represent a high risk to the defendant to order without having already secured a buyer.

[15] All of this was explained to Mr Ortmann prior to the ordering of the two vehicles. He and Mr Zimmermann explained to the plaintiff that the deposit would not be refundable if they proceed to order the said vehicles. Mr Ortmann was presented with the two options of the available vehicles and he opted to purchase both of the vehicles. The agreements were then signed and the deposit paid.

[16] The vehicles were ordered after the deposit was paid and they arrived on 9 June 2017. He then followed up the payment of the balance of the purchase price with Mr Ortmann. He enquired from the banks on the progress of the plaintiff’s application for finance but was informed that there were documents outstanding. Nothing came from these efforts.

[17] Mr Zimmermann explained that these vehicles are specifically ordered for a client who wants to buy it and the deposit is to secure the sale. The cost to keep the vehicles is prohibitive as they do not sell as fast as less expensive vehicles and it thus poses a high risk to the defendant to order the vehicles without having already secured a buyer. He explained this to Mr Ortmann and informed him that the deposit under these circumstances would not be refundable.

[18] After waiting for Mr Ortmann for 5 months to secure financing, he realised that he would have to look for alternative buyers for the two vehicles in order to mitigate the defendant's losses. The defendant obtained a credit facility to buy the vehicles from the dealer in South Africa. The defendant eventually sold the white Touareg on 16 October 2017. He however had to sell the vehicle at a lower price and offered the buyer a discount of N\$12 321.

[19] He further testified that he met with Mr Ortmann at an expo. Mr Ortmann jovially asked him where his Touareg was and he informed him that he already sold one of the vehicles but that the other one was still there. Mr Ortmann then informed him that the remaining vehicle was already old and he should order a new one for the plaintiff. He declined this request. On 1 November 2018 he sold the 2nd vehicle as a demo model at a discount of N\$87 567. Mr Ortmann made no attempt to contact the defendant and Mr Zimmermann was of the view that he was avoiding the defendant. He confirmed the correspondence which ensued between the parties two years after the agreement was entered into.

Nature of the agreement

[20] It is common cause that the parties signed both the documents titled "Offer to purchase" on 26 May 2017. The offer having been accepted, documented the agreement of sale which was conditional upon the fulfilment of the condition contained in paragraph 2.1.1 (b). No delivery took place and part payment was effected as a deposit to secure that the vehicles were ordered. The agreement thus falls into the category of a conditional contract. The parties agreed that the date for the fulfilment of the condition was 9 June 2017. It was not the defendant's case on the pleadings that this period was extended or that the condition precedent was waived by the plaintiff. This much was conceded by Ms Campbell, counsel for the defendant.

Fulfilment or non-fulfilment of the conditions

[21] The clear dispute between the parties is whether the condition was fulfilled. The pre-trial order indicates that the court is called upon to determine whether the plaintiff was unable to provide any proof of its ability to pay for the vehicles or written approval or a guarantee of financing of the vehicles by a registered credit provider within a period of 14 days from the date of contract and, if so, whether the contracts lapsed and are void *ab initio* as a result.

[22] It is common cause that the plaintiff was unable to obtain motor vehicle finance from a registered credit provider within the 14 day period.

[23] The only other condition precedent is whether the plaintiff was not able to provide satisfactory proof of its ability to pay for the vehicle. Mr Ortman testified that it was the plaintiff's intention to apply for vehicle finance from the outset and that same was communicated to Mr Amuphadi. Mr Zimmermann testified that he was assured that the plaintiff was able to pay the remaining purchase price when he paid a substantial deposit in the sum of N\$250 000. According to him this was satisfactory proof of the plaintiff's ability to pay.

[24] Mr Ortmann wanted to have the vehicles as soon as possible and he was confident, at the time he enquired about the vehicles, that the plaintiff would be able to resolve the dispute in which arose with the lucrative contract even though the last payment was at the end of March 2017. He was also able to pay the deposit promptly. This creates the impression that Mr Ortmann was confident that plaintiff would be able to pay the full outstanding purchase price. It was this conduct which led Mr Zimmermann to conclude that the plaintiff was able to pay for the vehicle. Mr Ortmann however testified that the plaintiff opted to apply for vehicle finance and this was communicated to Mr Amuphadi.

[25] Mr Amuphadi on the other hand did not specify what method of payment was agreed upon from the beginning. He was the representative of the defendant who dealt

with Mr Ortmann and Mr Zimmermann's interaction with Mr Ortmann was limited to a discussion that the plaintiff was required to pay a deposit and that such deposit would not be refundable. Mr Amuphadi failed to inform the court that the plaintiff intended to pay the full purchase price when the vehicles arrived. He in fact confirms that he was aware of Mr Ortmann's application for vehicle finance. Mr Ortmann on the other hand knew by the time that the vehicles arrived that plaintiff would not be in a position to pay the full purchase price. There was no indication as to the date on which the plaintiff applied for vehicles finance. There is however clear evidence that Mr Ortmann applied for vehicle finance and received a request for further documents by 21 June 2017 supporting the plaintiff's claim that it intended from the beginning to apply for vehicle finance and from these facts one may infer that the plaintiff was not able to provide proof of its ability to pay the full purchase price within the 14 day period.

[26] I am satisfied that the plaintiff, on a balance of probability, proved that it had opted to obtain written approval for vehicle finance and communicated its inability to provide satisfactory proof of its ability to pay to Mr Amuphadi. This condition precedent therefore has not been fulfilled

Fictional fulfilment

[27] Ms Campbell submitted that there was a deliberate frustration of contractual performance and the doctrine of fictional fulfilment is thus applicable. Mr Barnard, counsel for the plaintiff, submitted that the onus to prove fictional fulfilment lies with the defendant and that same has not been discharged.

[28] In *Koenig v Johnson & Co Ltd* 1935 AD 262, at page 272 Wessels CJ stated that:
'The nature of the contract is always an important element. In some cases the person benefited by the non-performance of the condition can sit still and do nothing to assist in its fulfilment; in other cases it is his legal duty to assist the condition being fulfilled, and in all cases if he deliberately and in bad faith prevents the fulfilment of the condition in order to escape the

consequence of the contract the law will consider the unfulfilled condition to have been fulfilled as against the person guilty of bad faith.¹

[29] The plaintiff had a duty to provide satisfactory proof of its ability to pay. Ms Campbell submitted that the plaintiff was able to provide such proof but deliberately frustrated the fulfilment of this condition.

[30] The fact that the plaintiff was able to pay a deposit cannot be construed as satisfactory proof of the plaintiff's ability to pay. Such proof can only be provided by the defendant's accounting records. These financial statements were forwarded to the plaintiff by 21 June 2017 i.e. after the expiry of the 14 day period. It cannot be said retrospectively and under these circumstances that the plaintiff was indeed able to provide prove that it was able to pay but deliberately and intentionally frustrated the fulfilment of this condition.

Effect of non-fulfilment of the condition(s)

[31] Christie's, *The Law of Contract in South Africa* 6 ed at 151 states that non fulfilment of a condition precedent normally renders the contract void¹ and at page 152 he states that a party who, in anticipation of the fulfilment of a condition precedent has made payments under the contract is entitled to the return of the money, unless the contract provides otherwise.² The contract in this matter in fact provides that the payment should be refunded less any reasonable charge the defendant is legally entitled to deduct.

[32] The first issue for determination is whether the defendant was entitled to deduct the charges.

¹ *Legate v Natal Land and Colonization Co Ltd* (1906) 27 NLR 439, *Administrator General vir die gebied Suidwes-Afrika v Hotel Onduri* (Edms) Bpk 4 SA 794 SWA

² *Barenblatt & Son v Dixon* 1917 CPD 3017; *Shultz v Morton T Co* 1918 TPD; *hall v Cox* 1926 CPD 228, *Cotton Tail Homes (Pty Ltd v Palm Fifteen (Pty) Ltd* 1977 1 SA 264 W.

[33] Mr Barnard submitted that the contract is void *ab initio* and that the defendant cannot rely on the contract for the charges. Ms Campbell submitted, correctly so in my view, that the contract dictates that the defendant may deduct reasonable charges which the defendant may legally deduct.

[34] Mr Barnard submitted that there is no indication of the legal basis the defendant relies to claim the charges. As indicated above, it is the contract which provides the legal basis entitling the defendant to deduct reasonable charges.

[35] Mr Barnard further submitted that the finance charges were not proven and that the defendant did not provide the actual proof.

[36] The pre-trial order stipulates that:

'In the event of it being held that the plaintiff was entitled to withdraw from the offers to purchase, or that same lapsed whether the reasonable cancellation fee in respect of POC 1 and POC 2 and which the defendant is entitled to deduct from the plaintiff's deposit amounts to N\$289,500.00, which amount is made up as follows:

9.1 finance charges at the cost of N\$9,500.00 per month for 4 months in respect of vehicle 1 = N\$38,000.00;

9.2 finance charges at the cost of N\$9,500.00 per month for 17 months in respect of vehicle 2 = N\$161,500.00

9.3 discounted price at which the vehicles were sold = N\$90,000.00 (amended to N\$87,567.00 + 12 321.00)

[37] There is no real dispute raised regarding the reasonableness of the charges but how the amount for the finance charges has been arrived at. It is in any event the view of this court that Mr Ortmann was aware of the fact that these vehicles would be ordered at a cost to the defendant.

[38] The defendant had the onus to prove that it paid finance charges and that it amounted to N\$9500 per month. The defendant testified that it was invoiced for these vehicles and payment was made from its credit facilities. The purchase price for the

vehicle is not in dispute i.e. N\$1,053,715.50 and N\$1,227,860.00 respectively. Documentary evidence to support the testimony of Mr Zimmerman was not adduced and neither was there a date indicated on which the payment was made. The invoices however reflect a due date for payment.

[39] I found the testimony of Mr Zimmermann to be credible and accept that payment was made and that it was made from defendant's credit facilities. Mr Barnard submitted that the letter of FNB which was discovered is not evidence as the contents needed to be proved by testimony of the author. He further submitted that it is improbable that the finance charges be the same given the difference in price. Ms Campbell submitted that this was not a calculation of damages but of reasonableness of the charges.

[40] Mr Barnard is quite correct that the letter of FNB must be regarded as admissible without further proof, but not that the contents thereof are true (See Rule 28 (7) (b)). There is however merit in the submission of Ms Campbell that the court must determine whether an amount of N\$9500 is a reasonable amount for finance charges. The amount of N\$9500 is roughly 10.82% of N\$1,053,715.50 which is the payment of the least costly vehicle. This is a reasonable rate of interest for credit finance when compared with the legal rate.

[41] The fact that the defendant had to sell the vehicle at a discounted price was not challenged as sufficient evidence was adduced to prove this.

[42] In light of these conclusions it would not be necessary to deal with the other issues raised. The defendant successfully proved that the reasonable charges which the defendant may legally deduct exceeded the deposit paid. In the premises no refund is payable to the plaintiff and its claim stands to be dismissed.

[43] The plaintiff has been partially successful in proving that the agreement had in fact lapsed. The defendant intimated that the plaintiff abandoned some of the issues of dispute at the start of the trial but the court is mindful of the fact that the defendant

applied for the amendment of the defendant's plea and the pre-trial order during the trial. It would be appropriate under these circumstances that each party should pay their own costs.

[44] In the result the following order is made:

4. The plaintiff's claim is dismissed.
5. Each party to pay their own costs.
6. The matter is removed from the roll and is regarded as finalised.

M A TOMMASI
Judge

APPEARANCES

PLAINTIFF: P Barnard
Instructed by Dr Weder, Kauta & Hoveka Inc.

DEFENDANT: C Van Der Westhuizen
Instructed by Etzold Duvenhage