IN THE HIGH COURT OF SOUTH AFRICA

NATAL PROVINCIAL DIVISION

**CASE NO:AR119/2008**

In the matter between:

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| KURT ROBERT KNOOP N.O. | FIRST APPELLANT/DEFENDANT |
| ERICH SCHRAVESANDE | SECOND APPELLANT/DEFENDANT |

and

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| STANDARD BANK OF S.A. LIMITED | RESPONDENT/PLAINTIFF |

JUDGMENT

KRUGER J:

**Introduction**

[1] This is an Appeal against a Judgment handed down on 18 January 2008 in the Durban Magistrate's Court by Additional Magistrate Mr, G. Field,, After the action began and before the Trial, the First Defendant was placed in liquidation which necessitated the substitution of its name with that of its liquidator. Save for this single difference "the parties remain as they were originally cited, In this Appeal Judgment reference to the parties shall be the same as in the court a *quo,*

[2] in terms of Rule 29(3), (4) and (5) of the Rules of the Magistrate's Court, the parties formulated a "STATEMENT OF FACTS AGREED AND DEFINITION OF ISSUES OF FACT AND LAW IN DISPUTE" (The "Rule 29 statement"),, This embodied certain issues that the parties agreed to, the defined disputes of fact, the issues of law, and an abandonment of the counter claim, although, at the hearing proper and by amendment, the counter claim of both Defendants was abandoned,,

[3] This Rule 29 Statement served as a basis for the hearing of the matter on Trial, on a stated case, as it were and as agreed to between the parties. The parties had also agreed that the Magistrate was to assume, for the purposes of his Judgment on the point to be decided, that the Motor Vehicle which was the subject of an installment sale agreement, was in fact the motor vehicle that had been illegally imported into the Republic of South Africa, alternatively, that it was a stolen motor vehicle (the "common assumption").,

**Background**

[4] The Rule 29 Statement also embodied the following background agreed facts. Plaintiff and the First Defendant had entered into an Installment Sale Agreement, on the 8th October 1997 and at Durban, in terms of which the Plaintiff sold and the First Defendant purchased a Toyota Land Cruiser VX LTD vehicle. On signing this agreement the Defendant paid the initial deposit of R 100 000 00 and took delivery of the vehicle. First Defendant had agreed to pay the balance of the purchase price in 54 agreed installments of R7 407,67, commencing on 8,h November 1997,,

[5] The First Defendant failed to pay any of the monthly installments Approximately four months after the First Defendant obtained possession of the vehicle, it was stolen from him and has never been recovered, This theft occurred on 6th February 1998.

[6] A claim against the insurers of the vehicle was unsuccessful, as the claim was met with a repudiation

[7] The parties also agreed that should the First Defendant fail to pay any installment on due date then the whole balance then outstanding will become due and payable and the Plaintiff was then entitled to cancel the agreement and repossess the goods, and that the interest payable in terms of the agreement (and in the event of the cancellation of the agreement on any amount outstanding by the First Defendant to the Plaintiff) would be at the prime rate of the Plaintiff.

[8] It was further agreed that in the event that the Plaintiff obtained a Judgment against the First Defendant, the latter would be liable for the Plaintiffs costs on an Attorney and client scale, The First Defendant had consented to the jurisdiction of the Magistrate's Court.

[9] The Second Defendant bound himself as surety for and co-principal debtor with the First Defendant to the Plaintiff for all monies then owing or which may in the future become owing by the First Defendant to the Plaintiff,,

[10] In terms of the Suretyship the Second Defendant had renounced the benefit of excussion, consented to the jurisdiction of the Magistrate's Court, and agreed that in the event of any Judgment being granted in favour of the Plaintiff as against the Second Defendant he would be liable for the costs thereof on the scale as between attorney and client.

[11] The parties also agreed that in the event that it be found that the First Defendant was not excused from payment by reason of the issues raised in the Plea and defined in the Rule 29 Statement, then it was agreed that ::-

11.1. the Plaintiff was entitled to cancel the agreement, upon the failure to pay the

monthly installments for November 1997 and the subsequent monthly installments;

11.2. as at that date, the amount outstanding in terms of the agreement was R282 902,74,,

11.3. in the event of a Judgment being granted in favour of the Plaintiff for R282 902,74 then the Defendants are liable therefor jointly and severally;

11.4. interest is payable on the said Judgment from 1 November 1997 to date of payment at the prime rate of the Standard Bank of South Africa.

[12] The Defendants denied that the Installment Sale Agreement was valid and enforceable on the following grounds (as taken from paragraph 11 of its amended Plea):-

"11

The Defendants deny that the installment sale agreement, annexure 'A' to the Plaintiffs Particulars of Claim is valid and enforceable in that

11.1. The Land Cruiser VX LTD motor vehicle which was the subject of the installment sale agreement was a motor vehicle illegally imported into the Republic of South Africa, alternatively it was a stolen vehicle,

11.2. In the event of it being found by this Honourable Court that the said motor vehicle was an illegally imported motor vehicle, then the Plaintiff could not have lawfully been in possession of the said motor vehicle and could not in turn place Webs Trading CC in lawful possession of the said motor vehicle,

11.3. In the premises, the Plaintiff could not lawfully comply with its obligation in terms of the installment sale agreement to give delivery of the said motor vehicle to Webs Trading CC

11.4. By virtue of the subject of the installment sale agreement not being capable of being in the lawful possession of any person in the Republic of South Africa, the installment sale agreement itself is illegal, invalid and unenforceable;

11.5. In the event of it being found by this Honourable Court that the said motor vehicle was a stolen motor vehicle, then the Plaintiff could not have lawfully sold the said motor vehicle to Webbs Trading CC and the said installment sale agreement is therefore illegal, invalid and unenforceable,

11.6 By virtue of the installment sale agreement being illegal, invalid and unenforceable, the accessory claim against the Second Defendant as surety is unenforceable "

[13] This quoted clause 11, as mentioned, was extracted from the First Defendant's "Amended Plea", and was embodied by consent within paragraph C.1. of the Rule 29 Statement, I shall return to this later.

[14] The Plaintiff contended that it did not know whether the vehicle was illegally imported into the Republic or not, or whether it was a stolen vehicle and accordingly put the Defendant to the proof thereof,

[15] The Plaintiff persisted in its contention that even if all such issues of fact, (save for Defendants allegation that Plaintiff knew that the vehicle was illegally imported into the Republic of South Africa or had been stolen) are decided in favour of the Plaintiff that the agreement is still lawful and binding upon the Defendants and that proof of such facts does not exclude the First Defendant from performance in terms of the agreement, by reason of the provisions of clause 2 and 17 of the agreement, read together,

[16] Clause 2 of the agreement, which Plaintiff seeks reliance upon, provides ::-

"2. Delivery

2.1. Purchaser has selected the goods from the supplier thereof (Supplier) and Seller has no knowledge of the purpose for which the goods are required by Purchaser,

2.2. Purchaser shall, at its own cost, procure and take delivery of the goods from the Seller or Supplier and shall hold the goods on behalf of the Seller for the duration of the agreement Delivery or tender of delivery by Seller or Supplier to Purchaser within 30 (thirty) days of the date hereof shall be deemed to be delivery of the goods by Seller to Purchaser.. Supplier shall not act as Seller's agent except for the purposes of delivery;

2.3. Purchaser shall inspect the goods on behalf of Seller before taking delivery and shall accept the goods on the Seller's behalf so that ownership of the goods shall pass to the Seller Purchaser warrants to Seller that the goods will not be defective in any way and shall be suitable for the purpose for which they have been acquired Purchaser is not authorised to act as Seller's agent except for the purpose of inspecting the goods and accepting delivery

2.4. If this agreement is not subject to the Credit Agreement Act (Act 75 of 1980) the Purchaser agrees that no warranties or representations have been given or made as to the state, condition or fitness of the goods The Purchaser takes the goods with all faults and accepts all risks of whatsoever nature in the goods,"

[17] The aforesaid Clause 2 is to be read together with Clause 17 and which provides:-

"17. Non-Variation

17 1 This is the entire agreement between the parties relating to the goods Subject to the provisions of CM, if CAA applies to this agreement, there are no implied or tacit terms or conditions to be read into this agreement

17 2 The schedule was fully completed prior to the signing of this agreement and the particulars therein are correct

17 3 This agreement may not be amended, cancelled or novated except and only to the extent that such amendment, cancellation or novation is reduced to writing and signed by both parties. No relaxation by Seller of any of the terms of this agreement shall be deemed to be a waiver of the Seller's rights and Seller may enforce the terms strictly at any time"

[18] Against that background, and with the consensual Rule 29 Statement, the parties approached the Court, on Trial, and invited the Court, without the hearing of any evidence, to decide the issues, with the common assumption earlier referred to, and purely after hearing argument from both sides.

[19] The Court found in favour of the Plaintiff and handed down an award substantially as per the Plaintiffs claim.

**The Appeal**

[20] Both the Defendants noted an Appeal against the whole of the judgment of the learned Magistrate.

[21] The first relief the Defendants seeks is that the matter is to be remitted back to the Trial Court to hear argument afresh, to the exclusion of the Amended-Plea. They contend that the Amended-Plea was erroneously included in the papers before the Court and that no reliance should have been placed on its contents. The Court a *quo's* reference to the Amended-Plea in its judgment is consequently also faulted by the Defendants.

[22] This contention is unsound and does not find favour with this Court. However, during argument, Counsel for the Defendants correctly in my opinion, abandoned this ground.

[23] Noteworthy however, is that the regularity or otherwise of such a procedural step relating to the amended Plea, cannot be raised for the first time on Appeal, particularly since it was not canvassed in the lower Court, (See *Federated Trust Ltd v Botha* 1978 (3) SA 645 (A). See also, for instance, *Cortis v Filby* 15 SC 88 at 90; *Ramodike v Mookeetsi Trading Store* 1955 (2) SA 169 (T) at 172A - 174A; *A Mertsch v Autovend Investments (Pty) Ltd* 1971 (3) SA 663 (SWA) at 664H - 665A; *Grobler v Bennion* 1976 (2) SA 459 (N) at 464C - E**),** I am in agreement with this view.

[24] There is accordingly no basis or reason to remit the matter for argument *de novo.*

[25] The Defendants do not dispute that the Court *a quo* correctly found that the defence of a breach of warranty against eviction had failed, The Defendants however, in their Notice of

Appeal, seek to introduce new, fresh, and different defences, namely :-

251 that the First Defendant was entitled to resile from the agreement because upon payment of the full purchase price the Plaintiff would not be able to pass ownership of the vehicle to the First Defendant (see Grounds of Appeal: para 2 : page 104);

252 because that was the **"express intention"** of the agreement (Grounds of Appeal; para 4 : page 104),,

[26] Our Courts have held the general view that it is not permissible to raise new points on Appeal for the first time, especially where the opposing party was not afforded the opportunity of dealing with such issues at the earlier hearing,, (See *Commissioner, South African Revenue Service v Woulidge* 2002 (1) SA 68 (SCA), and *Appiebee v Berkovitch* 1951 (3) SA 236 (C)) „ The Plaintiff's case may have been dealt with differently if these new points had been raised earlier,, Our Courts have declined to entertain such new points on Appeal, as was the approach adopted in the following *dicta ;*-

> "There is ample authority to the effect that it is not permissible to raise a new point on appeal in circumstances where one's opposing party did not have a proper opportunity to deal with the point at the earlier hearing Although there are no formal pleadings in tax appeals, the information sought and given under the right to information granted by the Constitution served the purpose of delineating the issues in the present case The respondent's case might well have been conducted differently in the Special Court if the point about the whole transaction being a sham had been raised earlier Considerations of fairness dictate that this Court should decline to entertain the point *(Commissioner for Inland Revenue v Conhage (Pty) Ltd (formerly Tycon (Pty) Ltd)* 1999 (4) SA 1149 (SCA) at 1157E (1999 (12) JTLR 337 at 341F)) "[1]

[27] The Supreme Court of Appeal has consistently adopted this view,, See *Road Accident Fund v Mothupi* 2000 (4) SA 38 (SCA), in which the following was said:-

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1 **See** *Commissionner, South African Revenue Services* v *Woulidge supra* at **para 8** of **the Judgment**

"Subject to what is said below, a Court will not allow a new point to be raised for the first time On appeal unless it was covered by the pleadings A party will not be permitted to do so if it would be unfair to his opponent (cf *Paddock Motors (Pty) Ltd v Ig&sund* 1976 (3) SA 16 (A) at 23D - H; *Bank of Lisbon and South Africa Ltd v The Master and Others* 1987 (1) SA 276 (A) D at 2906 -H) It would be unfair to the other party if the new point was not fully canvassed or investigated at the trial"[2]

(See also *R v* Carr1949 (4) SA 132 (T); *Bulford v Bob White's Service Station (Pvt) Ltd* 1973 (1)SA 188 (RA))„

[28] Defendants seek reliance upon the "express intention" (not the terms or the words) of the agreement, in support of the new defences now raised, and failed to make a reference to the *ipsissima verba* of the agreement,,

[29] The settled law is that in the absence of an express provision to the contrary, a seller of movables does not undertake to pass ownership of the goods sold but only warranties against eviction. (See *Garden City Motors v Bank of the Orange Free State* 1983 (2) SA 104 (N) at 110H; and *Alpha Trust (EDMS) Bpk v Van der* Watt 1975 (3) SA 734 (A) at 743H-744A).

[30] The Defendants must therefore rely on an express term of the agreement, if these new defences are to be dealt with favorably There is however no such express term in the agreement, The "Delivery" clause 2 of the agreement, which is set out above, is to be read with clause 4 of the agreement and which provides .

"4 Ownership

4 1 Seller shall remain the owner of the goods until Purchaser has paid all amounts and complied with all its obligations in terms of this agreement

4 2 Purchaser shall ensure that the goods are not attached to any other property (movable or immovable) so that they accede thereto and Purchaser undertakes, upon request, to provide Seller with a written waiver of accession from any person from whom Seller may require such waiver"

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2 **See** *Road Accident Fund v Mothupi, supra a***t para 30.**,

[31] It follows from a reading of clause 2 with clause 4 of the agreement, that :-

(a) there is a positive duty on the Purchaser (the First Defendant) to ensure that ownership passes to the Plaintiff, that is the obligation is not upon the Plaintiff to secure the ownership of the goods at the commencement of the Installment Sale Agreement;

(b) there is no express provision that on termination of the agreement (upon payment of the installments) that the plaintiff will be able to pass ownership of the vehicle to the First Defendant and the plaintiff is therefore not obliged to do so.

[32] There are no express terms of the agreement that lend support to the Defendants new defences, No obligation to pass title arises by implication of law

[33] Accordingly the Appeal must fail,

[34] By agreement between the parties (See the Rule 29 Statement), supported by the terms of the Installment Sale Agreement (see clause 13.2), it was agreed that costs shall be on an attorney and clients scale.

[35] In the result, the Appeal is dismissed and the Defendants (Appellants) are ordered to pay the costs of Appeal, jointly and severally, the one paying the other to be absolved, on the scale as between attorney and client,,

I agree

**K PILLAY, J**

**25 February 2009**