

SOUTH AFRICA / JUDGMENT

Nell v Rightway Developments CC (68688/2014) [2015] ZAGPPHC 1017 (9 September 2015)

[2015] ZAGPPHC 1017

COURT

North Gauteng High Court, Pretoria

BEFORE

Manamela

CASE / FILE NUMBER

68688/2014

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IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, PRETORIA

Case

No: 68688/2014

Date:

9/9/2015

In

the matter between: NELL
JOHANNES CAROLUS
Applicant
AND
RIGHTWAY
DEVELOPMENTS CC
Respondent
DATE
OF HEARING AND ORDER
06 AUGUST
2015
DATE
OF REASONS FOR THE ORDER
09 SEPTEMBER
2015

JUDGMENT

(REASONS FOR ORDER)

MANAMELA AJ

Introduction

[1] On 06 August 2015, I made an order in terms of which this matter was referred to trial. The order made is reflected at the end hereof. Although, the origin of the order was generally indicated, I undertook to revert with written full reasons for the order. The logic being, to allow the implementation of the time-sensitive parts of the order and undisturbed flow of the litigation between the parties, pending these reasons.

Applicant's Case

- [2] As appearing from the citation above, Mr Johannes Carolus Nell (Nell) is the applicant herein. He owns a well-travelled Nissan Hardbody 3000 whose speedometer reading was 445 384 kilometres in December
2012. He decided to have the vehicle's engine overhauled due to the high mileage. He took it to a garage operated by Rightway Developments CC, the respondent herein. The costs for the overhaul were agreed at R25 494.26.
- [3] It is common cause that the repair work done on Nell's vehicle was accompanied by a warranty. What is in dispute is the terms and conditions of this warranty. According to Nell he was assured that "all repairs had been attended to professionally";¹ 50% would be returned and the vehicle's engine overhauled again for free should any defects be discovered after the engine overhaul.² Further, his version is that, the warranty was for a period of 12 months or 30 000 kilometres, whichever was to come first.³

- [4] Nell says, following the overhaul, he returned the vehicle to Rightway in terms of the warranty on 27 February 2014, after it experienced some engine problems. He had already caused (in January
- 2014) an assessment⁴ or examination⁵ to be done on the vehicle by a third party. The assessment, he contends, revealed shortcomings in or defects on the repair work or overhaul by Rightway. He wanted Rightway to remedy the defects and repair the vehicle in terms of the warranty.
- [5] He contends that the repairs were not attended to despite the warranty. He was told to come and fetch the vehicle, but later when he demanded release of his vehicle, Rightway held on to it demanding payment of storage fees before releasing the vehicle. Rightway threatened that the vehicle will be sold to recoup the storage costs, if not collected. He disputed that Rightway is entitled to charge for storage and demanded the release of his vehicle, but in vain. He proceeded to launch this application interdicting Rightway from selling his vehicle and requesting that Rightway be ordered to return his vehicle. Evidently, the application is opposed by Rightway.

Respondent's case

- [6] Rightway filed its opposing affidavit two months late.⁶ The affidavit incorporated submissions for condonation of the late delivery of Rightway's opposing papers.⁷ There was opposition to condonation. I granted condonation and ruled that costs thereof are to form part of the costs order to be made in respect of the trial.⁸ There were attempts by the parties to amicably resolve the matter before opposing affidavit was filed.⁹
- [7] The ground of opposition of the application by Rightway is, in the main, that there is an amount of R96 195.00 due by Nell. The amount comprises R26 220.00 for repairs to the engine; R850.00 for repairs to the radiator and R69 125.00 for storage costs. Rightway submits that it has a creditor-debtor lien due to the aforesaid amount and therefore entitled to retain the vehicle until it has been paid in full. To this end, Rightway has also filed a counterclaim against Nell.¹⁰
- [8] As already indicated above, Rightway also denies that it issued a warranty on the terms alleged by Nell. It attached a job card indicating conditions of contract for the repairs done on Nell's vehicle.¹¹ According to Rightway this document states that a warranty for the services or "workmanship" on Nell's vehicle was 10 000 kilometres or 6 months, whichever comes first. ¹² The authenticity of the warranty document attached to Nell's papers is also disputed.¹³
- [9] Rightway further submits that Nell drove the vehicle in excess of the maximum kilometres or time-period allowed in terms of the warranty; did not bring the vehicle in for the first check which was to be at 1000 kilometres after the engine overhaul. Therefore, Nell had acted in breach of the warranty agreement. Rightway also submits that, when the vehicle was returned, it had only agreed to repair the vehicle on condition that damage was due to

defective workmanship on the previous repair work or overhaul to the engine. Otherwise, Nell was to be liable for the repairs.

- [10] According to Rightway the vehicle had a damaged radiator and this - in turn -caused damage to the engine and not poor workmanship as alleged by Nell. Nell was told of all these, including of costs of repairs, when he returned the vehicle. Nell failed to collect the vehicle and was charged storage costs at R395 per day from 7 days after 02 June 2014. Apparently, the latter is the date on which Nell had agreed to collect the radiator from a supplier so that it could be fitted in the vehicle, before the vehicle was to be released to him.

Dispute of Fact

- [11] Other than the above defences and counterclaim, Rightway averred, by way of a point in limine, a dispute of fact. It contended that the parties ought to be ordered to trial or application be dismissed due to the factual dispute on various material aspects. 14 It is said that Nell's challenge of the counterclaim on the ground that it is not susceptible to motion proceedings amounts to a concession that there is a material factual dispute. 15 Submissions on behalf of Rightway are that the versions proffered by Rightway differed materially and in various respects with the one by the Nell and that expert testimony is necessary in order for the court to have a better understanding of the issues.
- [12] However, it was submitted on behalf of Nell that, there is no dispute of facts on the material issues. Therefore, Rightway's point in limine fundamentally misses the fact that Nell's claim is effectively a *rei vindicatio*. I hasten to record my respectful disagreement in this regard. There is a clear dispute of fact and this is highlighted by the following. Nell alleges that he is entitled to have the vehicle repaired in terms of a warranty by Rightway. Rightway admits a warranty, but disputes the terms suggested by Nell and allege different terms. Also, Nell disputes that the vehicle was repaired when he returned it in terms of the warranty, but Rightway claim to have repaired the vehicle. There is also no commonality regarding whether Rightway is entitled to charge storage fees or not. The facts, as alleged in the papers are such that application of the Plascon-Evans rule is also not possible.¹⁶ Therefore, in my view, resolution of this matter in motion proceedings is not possible as there are very minimal common cause facts. 17 The crucial question under this kind of circumstances is whether there is a real dispute of fact. 18 In my view, there clearly is.¹⁹

Orderfor Referral to Trial and Substitution of Security

- [13] As indicated at the onset, after hearing counsel, I decided that the matter has to be referred to trial. However, I did not consider it to be an order upholding the point in limine raised by Rightway, but to be an order sourced from my review of the circumstances of this matter. In my view, when Nell launched this application a dispute of facts wasn't reasonably foreseeable.²⁰ Motion proceedings were therefore proper for the interdict and *rei vindicatio*. It doesn't appear that the repair costs were known to the Nell at that time, although the trial court will still be best placed to determine this, to the extent that it would still remain relevant and necessary. The referral to trial was necessary for this reason alone

and with the other submissions by counsel on both sides I consider my decision in this regard to be fortified. The counterclaim by Rightway is also significant for the referral decision.

- [14] There was an issue of the retention of the vehicle value whilst the trial is consummated. I have stated above that Nell's vehicle is of high mileage. Its value couldn't be established with accuracy upon my enquiry from counsel and I could not find any indication of this on the papers. However considering high the mileage, in my view, it would not be unreasonable to conclude that it is an old vehicle with a matching wear-and-tear value. Therefore, in my judgment, its value may deteriorate further whilst waiting for trial. Also, submissions made by counsel for Nell were that because Nell would rather have use of the vehicle in the meantime, he was prepared to offer payment of a cash amount equal to the amount of the costs of repairs excluding storage fees, claimed by Rightway. In my view this represented a reasonable and adequate substitute security,²¹ hence the order that Nell pay an amount of R26 220.00 into the interest-bearing account to be held in trust pending the outcome of the trial or an agreement between the parties. I also felt that the

interest accruing to the aforesaid amount would somewhat compensate Nell for his temporary parting with his money until a determination by the court or agreement between the parties to the contrary.

- [15] Counsel submitted that in order to avoid further arguments in this regard, should order that the condition of the impugned vehicle should be assessed by experts individually appointed by each party, before the vehicle was removed by Nell. However, I decided that this should be a right exercisable at will by either party, rather than a directive by the court.

- [16] I made the following order after hearing arguments by counsel on 06 August 2015:

- a) The interdict and rei vindicatio application (the main application) by the applicant against the respondent, and the application by the respondent for payment in the sum of R96 195.00 by the applicant (counterapplication) are referred to trial;
- b) The notice of motion filed by the applicant in the main application shall stand as simple summons, the opposing affidavit by the respondent, as well as, the respondent's counterapplication shall stand as a notice of intention to defend;
- c) The applicant shall deliver a declaration within 20 (twenty) days from date hereof;
- d) The Uniform Rules dealing with pleadings, discovery and the conduct of trials shall thereafter

apply;

- e) Subject to paragraphs f) and i) hereof, the respondent shall within 12 (twelve) hours release or hand over to the applicant or an authorised representative of the applicant, the Nissan Hardbody 3000 vehicle with registration number CXL 407 GP;

- f) The order in paragraph e) hereof shall not be executable or be of any effect until such time as the applicant furnished the respondent with proof of payment in the sum of R26 220.00 (twenty six thousand two hundred and twenty rand) into the trust account of the respondent's attorneys details of which shall have been furnished in terms of paragraph
- g) hereof. The sum of R26 220.00 (twenty six thousand two hundred and twenty rand) is substitute security in respect of the respondent's alleged creditor-debtor lien on the Nissan Hardbody 3000 vehicle with registration number [.....].
- g) The respondent shall furnish to the applicant within 2 (two) days hereof details of the trust account of the respondent's attorneys of record into which payment is to be made in terms of f) hereof;
- h) The respondent's attorneys of record undertake to deposit the monies paid into their trust account by the applicant in terms of f) hereof into a separate interest-bearing trust account until ordered otherwise or until directed otherwise in writing by both the applicant and the respondent acting jointly;
- i) The applicant and respondent shall each have the right to appoint an appropriately qualified person to inspect the condition of the Nissan Hardbody 3000 vehicle with registration number [...] within 14 (fourteen) days from date hereof; j) Costs of the main application, the counterapplication and the condonation application in respect of the late delivery of the respondent's opposing affidavit shall form part of the costs order to be ade in . spect of the trial.

K.LA.M. MANAMELA

Acting Judge of the High Court

APPEARANCES

For the Applicant

Adv. CD Roux

Instructed by

RC Christie Incorporated Pretoria

For the Respondent

Adv. NM da Rocha

Instructed by

AW Jaffer Attorney Pretoria West

1 See para 10 of the founding affidavit on indexed p 8

2 Ibid.

3 Ibid. See further annexure "JCN4" to the founding affidavit on indexed p16.

4 It is submitted in this regard that the assessment was done by Dekra Automated (Pty) Limited in association with Automobile Association of South Africa. See para 11.2 (the first 11.2) of the founding affidavit on indexed p 9.

5 The technical examination was conducted by Botha and Storm CC trading as TR Technical Investigation Services. See para 11.2 (the first 11.2) of the founding affidavit on indexed p 9.

6 The respondent's notice of intention to oppose was delivered on 22 September 2014 (see indexed pp 30 - 31) and its opposing affidavit was therefore due on 14 October 2014, but was only filed on 9 December 2014 (see indexed pp 44 - 45).

7 See para 2 of the founding affidavit on indexed pp 47 - 50.

8 See para [16] j) below.

9 See para 14.1 of the opposing affidavit on indexed p 92. The respondent admits that there were attempts at settlement until at least 14 October 2014. See further footnote above 6 above.

00 See the respondent's counterclaim on indexed pp 69 to 75.

11 See paras 12.2

- 12.5 of the opposing affidavit on indexed pp 54 - 55, and annexure "DW2" thereto on indexed p77. Most of the writing on "DW2" is illegible (probably due to bank ink or copying) and therefore hard to make out.

22 Ibid.

33 The letterhead used; signature; date and trading name reflected on the warranty document is disputed. See para 12.6 of the opposing affidavit on indexed pp S5 - S6.

44 See para 3 of the opposing affidavit on indexed pp 51-52.

55 See para 28 of the founding affidavit on indexed p 100; para 1.8 of the respondent's heads of argument on indexed p 133.

66 See *Plascan-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1 984

(3) SA 623 (A) at 634H-I.

77 See *Nat/anal Director of Public Prosecutions v Zuma* [2009] 2 All SA 243 (SCA) at para [26].

88 See *Roam Hire Co. (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd* 1 949

(3) SA 1155 (T) at 1162

99 See generally Cilliers AC, Loots C and Nel HC Herbsteln and van Wlnsen The Civil Practice af the High Courts and Supreme Court af Appeal of South Africa (5" edition) (Juta Cape Town 2009) at pp 466 - 468.

00 See Herbsteln and van Winsen at p 468 and Van Aswegen v Drotskle 1 964

(2) SA 391

(0) at 395C-D (parallel citation (1964] 2 All SA 475 (O) at pp 479-480).

11 See Van der Merwe CG and Pope A "Real Security" in Ou Bois F (ed) Wllle's Principles of South African Law (9th edition) (Juta Cape Town 2007) at p 665.

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