

SOUTH AFRICA / JUDGMENT

Urban Distributors CC v Black and White Truck Distributors CC (83091/2017) [2020] ZAGPPHC 522 (28 August 2020) [2020] ZAGPPHC 522

COURT

North Gauteng High Court, Pretoria

BEFORE

Holland-Muter

CASE / FILE NUMBER

83091/2017

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REPUBLIC
OF SOUTH AFRICA
IN
THE HIGH COURT OF SOUTH AFRICA
(GAUTENG
DIVISION, PRETORIA)
Case No: 83091/2017

In the matter between: URBAN DISTRIBUTORS
 CC Plaintiff
 and
 BLACK AND WHITE TRUCK
 DISTRIBUTORS CC
 Defendant

JUDGEMENT

(Judgement handed down via Email and CaseLines due to Covid-19. Judgement deemed to be handed down on date of Mail)

INTRODUCTION:

- [1] The Courts have a constitutional duty towards litigants but are not in the service of any party. Parties have to abide with the Rules of Court, Practice Directives and the sittings of the courts as determined by the Chief Justice. Parties cannot be prescriptive

towards the court as to when and how hearings should take place. As will be seen below where and when the parties are accommodated

outside normal scheduled sittings, the least that a party should do is to adhere to the agreed arrangements and not inconvenience other parties or the court by deviating from special arrangements.

- [2] It sometimes happens that parties seem to accept that they may “direct” proceedings and time frames and that the court should abide with their schedules and availability. This is not acceptable.
- [3] The matter came before this court on 3 June 2020 after being allocated by the ADJP to proceed in open court. The reasons advanced for a hearing in open court were the technical difficulty of the matter, with numerous photos of at the ten vehicles and at least seven witnesses to testify. Both counsel informed me in chambers before the trial commenced that their estimated duration was 5 days because the plaintiff intend calling five to six witnesses and the defendant at least two witnesses.
- [4] The Judges are allocated for civil trials each term in the duty roster. I was acting for a period of four weeks from 1 June 2020 until 26 June 2020 during the second term. I was on the Opposed Motion Roll for the first week. The opposed motion court roll for the first week was finalized and I became available from the Tuesday for the rest of the week to assist with civil trials for the rest of the first week. I have been assigned for appeals during the next week and any civil trial allocated had to be finalized during that week or be postponed (if it becomes part heard which is not ideal) to a suitable time during the upcoming reses.
- [5] Mr Van Zyl (counsel for the plaintiff) informed me in chambers that he was only available on 3 June 2020 until 13:00 and the following two days. He had other commitments for the afternoon. This would have resulted in the trial continuing for at most two and a half days while the estimation was five days. Being on acting judge duty, any part heard matter normally results in a long outdrawn fragmented hearing which is neither cost nor time effective.
- [6] In the interest of the parties and to accommodate all, and with the approval of the ADJP, the matter was postponed for trial for the week of 6 to 10 July 2020 in the upcoming July reses. I requested both counsel to ensure that all witnesses will be available during the arranged week and that the necessary steps be taken to ensure the safety of all involved due the Covid-19 pandemic.
- [7] The hearing commenced on Monday 6 July 2020 but was interrupted on 7 and 8 July 2020 for reason of the Covid-19 pandemic. The court building was closed for the two days for the necessary sanitation after some of the administrative personal tested positive for the dreaded virus. When the hearing resumed on 9 July 2020 Mr Van Zyl informed the court that the one necessary witness (who was available on 7 and 8 July

- 2020) was sent to KwaZulu-Natal by his employer early on Thursday 9 July 2020 to do a delivery. Mr Van Zyl requested a postponement to the beginning of August 2020. This request was refused and the plaintiff was directed to proceed with the other witnesses it intended calling and that the absent witness will be at court to testify on Monday 13 July 2020. If the witness was absent, the matter would proceed without the witness. It was unacceptable that the employer acted in this way more particular when the hearing was arranged to ensure a speedy hearing. The witness was present on 13 July 2020 and the matter proceeded.
- [8] After all evidence was lead, the matter stood down to Thursday 16 July 2020 to enable counsel to prepare written arguments in amplification of oral arguments if necessary. Written submissions were filed on 15 July 2020 and oral arguments heard on 16 July 2020 where-after judgement was reserved.
- [9] After perusing the written heads of arguments, I requested both counsel for supplementary heads of arguments to address the question whether the common law guarantee against latent defects could exist in conjunction with the expressed agreed warranty given by the defendant? The terms of this warranty was that all trucks were sold under warranty against defects in material which entailed that defective parts shall be repaired or exchanged if such defect develops during first 5 000 km or within one month from date of purchase. (See 1.6.2.3 of the minutes of the pre-trial conference held on 26 September 2018 as confirmed in the pre-trial held on 6 May 2020 in par 2.6 thereof). This warranty was also printed on the Pro Invoice the seller gave to the purchaser on 25 October 2016. See p 203 in the bundle of discovered notices. These supplementary heads of arguments were filed on 1 August 2020.

CLAIM AND COUNTERCLAIMS:

- [10] Pleadings are the written statements of the parties which must set out in summary form the material facts on which each party relies in support of his claim or defence. See Erasmus, Superior Court Practice Vol 2 D1-228. Parties are limited to their pleadings. Pleadings are made for the court to determine the real issues between the parties and the court has a wide discretion to decide the real issues. It is however not the function of the court to consider and deal with non-pleaded issues and a trial should not become a “free for all” with disregard of the issues raised on the pleadings.
- [11] The plaintiff’s claim is based on an oral agreement between the parties entered into on 28 November 2016 in terms of which the plaintiff purchased ten (10) Samil vehicles from the defendant. The trucks were sold as reconditioned trucks. In the particulars of claim the plaintiff alleges that the trucks had latent defects and displayed poor condition and poor performance on-route to Malawi during December 2016. (Par 5 (5.1-5.7) of the particulars of claim). These defects and/or poor condition of the vehicles are very vague and in general without identifying it to a specific vehicle. Mr van Zyl argued that the defendant was liable for the consequential damages. This was based on the judgement of Kroonstad Westelike Boere-Ko-op Vereniging Bpk v Botha and Another 1964 (3) SA 561 A. See below.

- [12] The defendant filed two counterclaims (i) for payment of the amount of R 10 270, 98 for replacement parts supplied to the plaintiff (while the vehicles were in Malawi) and (ii) for the delivery of certain tools as specified or in the alternative the payment of the amount of R 23 534, 62.
- [13] The particulars of claim lacked any reference to the terms of the oral agreement with regard to the agreed warranty given by the defendant. The court accepts that the agreement was an oral agreement as (1) no written agreement was annexed and (2) neither did the defendant raise any objection against the particulars of claim in terms of Rule 18(6) of the Uniform Rules of Court. The only written document with an indication of the agreed terms can be found on the Pro Invoices dated 25 October 2016 (above). These include the vehicles identification, the individual price per vehicle and the express warranty.
- [14] The parties agreed that the matter proceed on the following disputes as set out below in par [16] and that the quantum aspect be separated in terms of Rule 33.4 and postponed sine die.
- [15] The parties also included a copy of an application brought by Nedbank against the plaintiff under case number 72267/2017 where the two matters were consolidated. The parties did not indicate at all what this court should do with the consolidated matter and requested the court to proceed on the so-called merits of the action alone. There are certain aspects in the application which has a bearing on this trial and it will be discussed below. It is clear from this application that the purchase was financed v Nedbank on a credit agreement in access of R 3 million.

DISPUTE BEFORE THE COURT:

- [16] There were three (3) questions posed by the parties to be determined by the court namely (1) Whether the defendant was in breach of the implied warranty against latent defects of the sale and purchase of any or all the vehicles identified in par 5 of the Particulars of claim; (2) whether the plaintiff was liable for payment of the replacement parts listed in annexure "X" to the Defendant's Plea and Counterclaim and (3) whether the plaintiff is liable for the return of the goods listed in paragraph 10 of the Defendant's Second Claim in Reconvention or the market value thereof?
- [17] It seems that the plaintiff's claim is based on the *actio empti* to hold the defendant liable for latent defects in the object sold. A party's claim for damages suffered with this action is based on breach of contract. The Particulars of Claim is not a model example of what should be alleged to formulate such a claim. There is no allegation that the seller (the defendant), when the transaction was entered into, of any expressly or impliedly warranted the absence of any defects. This is clarified by the plea and the invoices delivered to the plaintiff and the plaintiff did not deny the existence of the warranty in a replication.
- [18] The plaintiff's averment in par 6 of the particulars of claim that it suffered a loss of R 3 933 000, 00 "as a result of the Defendant's failure to sell to the Plaintiff Samil vehicles that were not defective, of good quality, in good working order or good condition and reasonably

suitable for the purpose generally intended” is the only reference to what can be seen as part of the terms of the agreement of sale with regard to the quality of the goods delivered. This calls for expert evidence if compared with what Willis J held in *Bonanza Interiors (Edms) Bpk v Murau Vehicle Sale (Edms) Bpk Case A 3065/2001 WLD* (judgement on 17/0/2002) p 3—reference to an expert’s examination of a vehicle where the question of latent defects were an issue.

- [19] In par 5 the Plaintiff sets out the lists the alleged latent defects which caused it to suffer the alleged damages. These listed defects in my view called for expert evidence to explain how it contributed to the damages and rendering all the vehicles not suited for the purpose of sale of the vehicles. No expert witness testified in support of the Plaintiff’s claim that the vehicles were of a substandard quality non-suited for the purpose of the purchase of the vehicles. The only two witnesses who seemingly purported to be experts, namely Pride Gundwane (“Gundwane”) and John Moster Harper (“Harper”), gave evidence which came close to what is expected from expert witnesses. They however did not testify as experts. There was no compliance with Rule witnesses to enable the court to any finding based on expert evidence that the vehicles did not meet the proposed requirements of sale.

WARRANTY:

- [20] The only warranty in place seems that as set out above and in the minutes of the pre-trial minutes dated 28 September 2018 and referred to in the invoice dated 25 October 2016 (p 203). The terms of the warranty is that the trucks are sold under a warranty against defects in material which entailed that defective parts shall be repaired or exchanged if such defect develops during the first 5 000 km, or alternatively within one month from date of purchase, which occurs first. There were certain conditions under which the defendant undertook to replace defective parts with the proviso that replaced parts be returned to the defendant’s premises. the defendant also had the right to inspect the vehicles to determine whether the warranty applied to a particular breakdown.
- [21]No reference is made in the particulars of claim whether the Consumer Protection Act, 68 of 2008 (the “CPA”) finds any application in this matter. In his later additional written heads of argument, Mr Wildenboer on behalf of the defendant, referred to the CPA without any deliberation thereof. I could find no case law stating that the CPA warranty co-exists with any expressly agreed warranty. This is not a case of a voetstoots clause being overridden by the provisions of section 56 of the CPA (Implied warranty of quality) or warranty on repaired goods as in section 57 of the CPA.
- [22] There is also no allegation in the particulars of claim that the defendant was a merchant who professed to have a special knowledge in the goods which it sells. The brochure (on p 280-281) on the defendant’s website did not influence the plaintiff because it only became aware of the brochure sometime after the sale was concluded according to Niehaus.

- [23] It is trite that a dealer in goods who professes to have a special knowledge in the goods which he sells, is liable for damages arising from latent defects and bears the onus of proving that such liability was expressly or by necessary implication, excluded. See *Kroonstad Westelike Boere-Ko-op Vereniging Bpk v Botha and Another* 1964(3) SA 561 A and *Langeberg Voedsel Bpk v Sarculum Boerdery Bpk* 1996(2) SA 565 SCA. This was followed in the *Bonanza Case* *supra* on p4.
- [24] There is further no allegation by the plaintiff that the CPA is indeed applicable and that the exclusions in section 5(2) of the CPA is not applicable on the matter. No evidence as to the annual turnover of the plaintiff was given nor that the credit agreement is not excluded from the operation of the CPA. It is not for the court to guess what the position of the plaintiff is regarding the CPA. The transaction alone warrants the inference that the annual turnover of the defendant exceeded the current monetary threshold of R 2 million as in section 5.2 of the CPA.
- [25] The distinction between the above case law and the matter before the court is clearly that in the above cases expert evidence were presented to enable the court to find on whether the alleged defects indeed were of such nature that the defendant could be held liable therefore? The value of the evidence will be discussed below.
- [26] Mr Wildenboer argued on behalf of the defendant that the plaintiff's case is based on the action *redhibitoria*. If so, the requirements for the *actio redhibitoria* should be pleaded and proved by the plaintiff. See Harms, *Amler's Precedents of Pleadings* 6th ed p215-216. A party claiming with this action must be able and willing to effect restitution or there should be sufficient grounds why restitution

should not be excused. See *Hall-Thermotank Natal (Pty) Ltd v Hardman* 1968 (4) SA 818 D. A purchased who is unable to prove the latter two elements of the action *redhibitoria* may claim a price reduction with the action *quantum minoris*. This is not the plaintiff's claim and the closest the plaintiff came in this regard was that there was an attempt to persuade the defendant to buy-back the trucks.

[27] The plaintiff called the following five witnesses:

Hubert Stephan Autret Niehaus;

Jean Christoffel Niehaus ("Niehaus" and brother of the first witness);

Pride Gundwane ("Pride");

John Moster Harper (Harper"); and

Victor Ballard;

[28] The defendant called the following two witnesses:

Marc Noble; and

Stanley Katsa (also known as “Thalang”).

[29] The evidence of (Jean) Niehaus, Pride, and Harper on behalf of the plaintiff and Noble and Thalang on behalf of the defendant would have been the evidence which holds the key to solve the dispute but for it not being expert evidence. In my view the lack of expert evidence makes it impossible for the court to find that the aspects complained about indeed constituted poor performance of the vehicles or that the vehicles were in a poor condition. To prevent the judgement becoming unnecessary detailed, the evidence is not repeated but reference is made to relevant portions thereof as the alleged problems are discussed.

[30] When the alleged defects in par 5 (5.1-5-7) is analyzed (taking into account the averments in par 7 of the particulars of claim), the following is clear from the evidence:

- (i) The claim for 150 litres diesel per vehicle wasted is contrary the evidence. Harper testified that only one vehicle on route suffered from fuel starvation and he fixed this problem by flushing the diesel tank. A jelly-like substance was drained from the fuel tank and after the necessary fuel filters were fitted, the vehicle performed like the other vehicles. None of the other vehicles encountered fuel starvation. No expert evidence was led as to the jelly-like substance in the fuel tanks.
- (ii) The defendant supplied a mechanic (Harper) to accompany the vehicles on route to Malawi to perform the necessary repairs to the vehicles on route. This was for the account of the defendant. According to Harper the following problems were encountered on route which he fixed namely the fuel starvation of the one truck; the wheel alignment of one truck which Harper fixed temporarily on route with a piece of rope; and attending to certain tyres. The plaintiff chose used tyres despite an offer from the defendant for new tyres (although at a higher price). Niehaus inspected the vehicles on site and was satisfied with the old tyres on the trucks. These tyres were probably at least 30 years old and suffered from so-called rubber fatigue. Whether this amount to an expert's fixing of the problem is debatable.
- (iii) The third vehicle's bolts holding the gearbox in place came loose on route but after tightening it, the problem was solved. There was an allegation by Noble that these bolts may come loose during the operation but no expert evidence was led on this aspect.
- (iv) The gearbox detaching from one of the vehicles was fixed in Malawi by Thalang when he fixed the transfer case that also detached. Thalang fixed the loose prop shaft as well. The one gearbox that became stuck in low range was manually fixed in Malawi. No expert evidence was led on this aspect.
- (v) No expert evidence was led as to whether the vibrations on the transfer cases of the vehicles were latent mechanical defects or the result of usage of the reconditioned vehicles or anything else. Similar no expert evidence was presented on the alleged defective crankshafts and whether the repairs done by Thalang fixed the problem. No evidence was tendered as to what the reconditioning of vehicle entails.

(vi) I find it difficult to believe that the cabins of some of the trucks were so dilapidated and rusted that it leaked when in rain. If this was the case, and in view of the numerous other photos taken of almost everything, one would have expected similar photos depicting the rusted cabin roofs and the defective door locks tightened with rope to secure the doors. There was a suggestion that the “cracks” in the cabin roofs were covered by a layer of paint. I find this evidence farfetched and devoid of any truth.

(vii) I find it difficult to believe that the plaintiff’s driver of the one vehicle never reported the defective speedometer cable hampering the report back the World Food Programme (WFP) directly impacting on the distance travelled by the truck to reconcile for remuneration and fuel consumption. This was the crux for the plaintiff’s calculations per kilometre to be compensated by the WFP. This aspect is hard to believe at all.

(viii) Pride meticulously reported on the first five vehicle’s problems in Malawi in his E-mail to Niehaus on 20 December 2016 (p 231-232) but nowhere even makes a list of problems encountered with the other vehicles. No satisfactory explanation for this default is given. Pride is the person in control in Malawi on behalf of the plaintiff and it could be expected that he would report on the other vehicles in a similar way.

(ix) The problem with a defective compressor was attended to by Thalang when he replaced Harper in Malawi and this problem no longer existed. No evidence was tendered on the alleged overheating by one of the first five trucks as reported by Pride. There is also no expert evidence as to any possible cause for overheating.

(x) Pride testified that only one crankshaft was not repaired in Malawi but that all other breakdowns were fixed but for the one speedometer cable. One aspect that was never covered in the particulars of claim but became an issue during evidence was that the drivers had to “borrow” or “share” a starter motor from one truck to another to start the second and that this was an on-going problem. This was never part of the complaints raised by Pride in any of the written communications he had with the plaintiff’s office neither in South Africa nor in the particulars of claim. I find this very strange as this, if true, was a serious aspect to address. No reason for this omission was given justifying the inference that it is farfetched.

(xi) With regard to the tarra and GVM (Gross Vehicle Mass) Niehaus’s evidence was not satisfactory. There was further incorrect

information on the Road Worthy Certificates issued by the Local Authority which muddled the issue of the carrying capability of the vehicles. It is not for the court to guess what the correct version ought to be.

(xii) No evidence was led with regard to the one vehicle involved in an accident in Malawi whether it was due to mechanical failure of brakes or driver negligence.

[31] The evidence of Hubert Niehaus (the first witness) was merely how the plaintiff’s business operates and that his brother, Jean Niehaus was involved in the negotiations with the defendant. The evidence of Victor Ballard does not take the matter much further. He

mentioned that some of the vehicles' fuel tanks and pipes were dirty, but that it was cleaned. He further testified that some of the vehicles had electrical problems mainly with the head lights and he attended thereto. This was not mentioned by the other witnesses. It does not take the matter further as he did not testify as an expert. Nor did he voice any expert opinion with regard to the dispute whether the trucks were indeed of poor quality and not suited for the purpose purchased.

[31] When confronted with improbabilities of this nature, the reasonable inference is that the plaintiff's version is shy of the truth and could not be accepted. Further in view of the lack of expert evidence on the alleged poor condition and performance of the trucks I am reluctant to rely the plaintiff's version. Harper was clearly hostile to his former employer (the defendant) and this colours his version. The onus rests on the plaintiff and in my view the plaintiff has failed to prove its case.

[32] This brings the court to the counterclaims. There were conflicting versions as to who would be responsible for the defendant's

tools in Malawi after Harper left and before Thalang arrived in Malawi. The possibilities exist that the tools were left in the

possession of the plaintiff's drivers but no direct evidence was presented on this aspect. There probably was an arrangement

between Harper and the other drivers but in my view this is not proof that the plaintiff should be liable for the missing tools. The tools were probably used in the workshop of WFP by all in the workshop and not exclusively by the plaintiff's drivers. The possibility exists that other persons who had access thereto may have taken it. This claim cannot succeed.

[33] The counterclaim for the replacement parts is in my view without any substance. The majority of parts listed in the annexure to the counterclaim are consumables like filters, tubes, fan belts and similar parts which are not likely to be returned all the way from Malawi the South Africa. This claim cannot succeed.

ORDER:

[34] The plaintiff's claim is dismissed with costs.

[35] The defendant's counterclaims are dismissed with costs.

[36] The costs for 3 June 2020 follow the above cost order.

J HOLLAND-MUTER

Acting Judge of the Pretoria High Court

Heard on 6, 9, 10, 13 716/8/2020.

Written heads filed on 15/7/2020 and oral arguments on 16/7/2020.

Supplementary written heads filed on 1/8/2020

Judgement handed down on 28/8/2020

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