

SOUTH AFRICA / JUDGMENT

Van der Boon NO and Others v Moletsane (A213/2019) [2020] ZAFSHC 208 (20 November 2020) [2020] ZAFSHC 208

COURT

Free State High Court, Bloemfontein

BEFORE

M.A. Mathebula, N. Daniso

CASE / FILE NUMBER

A213/2019

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IN

THE HIGH COURT OF SOUTH AFRICA,

FREE

STATE DIVISION, BLOEMFONTEIN

Case

number: A213/2019

In

the matter between:

ADRIANA

VAN DER BOON N.O. 1st

Appellant/1st Defendant

ANTHONY

PIETER MITCHEL N.O. 2nd

Appellant/2nd Defendant

HANS

KOR HENDRIK VAN DER BOON N.O. 3rd

Appellant/3rd Defendant

and

PAULUS

MOLETSANE

Respondent/Plaintiff

HEARD

ON:

20 AUGUST 2020

JUDGMENT

BY: MATHEBULA, J et DANISO, J

DELIVERED ON: 20 November 2020

- [1] The appellants (defendants) appeal to this Court against the decision of the regional magistrate, Bloemfontein upholding the respondent's (plaintiff's) claim for cancellation of the agreement and payment of R388 000.00 against the return of the Isuzu KB200 LX Double Cab (motor vehicle/merx). The appellants were sued in their capacities as the trustees of H & A Trust (IT 001323/2005)
- [2] It is fitting to briefly discuss the salient facts of the case. On 25 November 2014 the appellants (defendants in the court below) sold an Isuzu KB300 LX Double Cab 2014 model to the respondent for the sum of R388 000.00. The motor vehicle had just clocked under 6 000 kilometres on the odometer. The conclusion of the sale was in terms of an oral agreement. It is common cause that the respondent took the delivery of the motor vehicle around midday on 26 November 2014 upon payment of the full purchase price. The very same afternoon after a light shower he discovered that the bodywork was leaking.
- [3] Few more kilometres down the road he felt it losing power and an unusual noise followed by a cloud of smoke emitting from the back (probably from an exhaust pipe). He placed telephone calls to both Ben (salesman) and Hans van der Boon (the 3rd appellant) for assistance but none was forthcoming. The end result is that the motor vehicle was examined by an accredited

Imperial General Motors dealership which unearthed several defects. Clearly the motor vehicle had been involved in the accident and repaired by an unaccredited panelbeater which act voided its warranty and service plan. This part was not disclosed to the respondent. His efforts to return it were also thwarted or frustrated by the appellants. I intend not to dwell extensively on the facts as they are properly explained in the judgement of the court below.

- [4] The appellants raised several defences before the learned magistrate. The appellants denied that the motor vehicle had

any latent defects. Importantly denied that such was not disclosed to the respondent. At some stage the appellants

sought to rely on the voetstoets clause as it appears on the tax invoice dated 26 November 2014. It did not surprise me when these

defences were dropped and counsel for the appellants conceded that the appellants through the salesman and/or the third appellant did not disclose the latent defect to the respondent. Therefore there was a misrepresentation. It was also conceded that when the respondent became aware of the latent defect he brought it to the attention of the third appellant and noted his intention to cancel the agreement. The third appellant flatly refused cancellation and the

respondent retained the motor vehicle in his possession. At the time of the trial, it had clocked an additional 70 000 kilometres.

[5] The only point raised in this appeal is a broad challenge that the learned magistrate erred in his application of the principles of *actio redhibitoria*. This is an action to cancel a sale on consequence of defects in the thing(s) sold. In matters of this nature the purchaser may set the contract aside and claim *restitutio in integrum*. The seller must repay the purchase price with interest and compensate for all the expenses incurred in relation to the item concerned from the time of its receipt. The main contention is that the respondent continued to utilise the motor vehicle accumulating thousands of kilometres after he became aware of the defect. As a result, he derived benefit and cannot be entitled to the relief claimed.

[6] In his well thought judgment the learned magistrate was alive to the principles applicable for a litigant to succeed in an action of this nature. He correctly relied on the passage discussed in *De Vries v Wholesale Cars en 'n ander* where this court said the following:-

“Die vraag wat beantwoord moet word is of die gebreke so ernstig was dat 'n koper nie sou gekoop het nie indien hy daarvan bewus was toe die ooreenkoms aangegaan is.”[1]

[7] In *Du Plessis v West Combrink J* stated that:-

“Where the purchaser chooses to pursue redress by way of the actio redhibitoria he will, in addition, have to show that, had he known about the defect in the res vendita, he would not have entered into the sale and also that he is willing and able to effect restitution of the res, or is excused therefrom. Whilst there is a subjective element to the buyer's assertion that he would not have entered into the sale if he had been aware of the defect, that must notwithstanding be objectively sustainable. At the end of the day the Court must be satisfied on all the evidence that a reasonable man in the buyer's shoes would have held a similar view”[2]

[8] The uncontroverted evidence is that the functionality of the motor vehicle was fundamentally compromised. There was a litany of defects which could not be expected from such a motor vehicle. Clearly as the respondent testified, he would not have purchased it had he been aware of them. The learned magistrate correctly held that the defects hampered the very purpose of the motor vehicle as they negatively impacted on its use or effectiveness.

[9] There is no doubt that the learned magistrate carefully considered all authorities and analysed the facts of the matter. In a manner that can hardly be termed a misdirection or error on his part he concluded that the respondent is entitled to the relief claimed. The centrepiece of the appeal is whether the respondent waived his right when he repaired the motor vehicle a year later after he became aware of the defect and obtained benefit from its use.

[10] In *Miller and another N.O. v Dannecker*[3] the court stated the following:-

“Waiver is the deliberate abandonment, renunciation or surrender of an existing legal right by the right holder, acting with full knowledge of the right”

The submission of the appellant is based on the proposition that the respondent has waived his right alternatively has elected another

remedy. In short the respondent cannot elect another remedy. In case the appellant persisted with its breach and did not remedy it.

[11] Before dealing with how the learned magistrate approached this issue, the court in *Primat Construction CC v Mandela Bay Metropolitan Municipality* held that repudiation is accordingly not a matter of intention but perception. That perception is that of a reasonable person placed in the position of the innocent party.

[12] Turning to the case on hand, the learned magistrate on the facts concluded that it has always been the intention of the respondent to return the motor vehicle. This was rendered impossible by the appellant. At all material times the respondent demonstrated

his intention to return the motor vehicle. It would not have been just and equitable to expect the respondent to park the motor vehicle in his garage, continue to pay licence fees, insurance, car hire etc and ensure that it does not suffer any damages while litigation proceedings are dragging on endlessly.

[13] Indeed the thing must be restored to the original condition. In this matter the learned magistrate correctly relied on the passage in *HALL*

- *THERMOTANK NATAL (PTY) LTD v HARDMAN*[4] where the court said the following:-

“According to Wessels, Law of Contract, 2nd ed., para. 4742 (after a statement in the preceding paragraph that, as a general rule, the actio redhibitoria can only be brought where the thing can be restored),

'Although there must be restitution, and although the parties must be placed as much as possible in the position in which they were before the sale, yet a restitutio in integrum in the case of sale does not imply that the article must always be restored in exactly the same condition in which it was at the moment of delivery. As the fault is due to the seller the court ought to give considerable latitude to the buyer. All the latter need therefore to do is to restore the article subject to such incidents as it may be liable to in the ordinary course of affairs, either from its inherent nature or from the legitimate use to which the buyer put it prior to the discovery of the defect. The very contract of sale gives the purchaser the right to deal with the thing bought, and if it deteriorates in the hands of the buyer whilst making a reasonable use or trial of it, the reduction in value resulting from such depreciation must be borne by the seller, and does not preclude a restitutio in integrum.

In para. 4743 Wessels states that if the thing bought perished *casu fortuito*, so that restitution is impossible, the *actio redhibitoria* can still be instituted, and he refers to D. 21.1.47.1, 48 pr., which is to the effect that a purchaser of a slave who has died retains his remedy to redhibit, provided the death of the slave was not due to the fault of the purchaser, or of his family or of his agent.”

I agree

[14] Clearly the issue of the depreciation of the motor vehicle was not pleaded. As the learned magistrate correctly held, it was not the case of the appellant. It cannot be considered by this court because it was not the case of the appellant before the court below. There was no counterclaim and there is no basis to entertain an argument pertaining to an enrichment claim outside the pleadings. I find no merit in the submissions of the counsel for the appellants in the context of what was the case before the court below.

[15] Turning to the question of costs, the appellant has been unsuccessful and as such must pay the costs. I can think of no reason justifying deviation from the accepted principle that the losing party pays the costs.

[16] Accordingly I make the following order:-

16. 1 The appeal is dismissed with costs.

--_____

M. A. MATHEBULA, J

I concur

N. DANISO, J

On behalf of applicants: Adv. G. S. J. v Rensburg

Instructed by: Phatshoane Henney Attorneys

BLOEMFONTEIN

On behalf of respondent: Adv. A. P. Berry

Instructed by: Van Wyk Preller Inc.

[1] 1986

(2) SA 22 (O) at 25 C

[2]

(1998) JOL 202 (N) para 5

[3] 2001 (1) SA 928 (C) at 936 (C)

[4] 1968 (4) SA 818 (D) at 827 B-D

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