

**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, JOHANNESBURG)**

CASE NO: 2022/003881

- (1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED: YES/NO

Date: 14 March 2023

In the matter between:-

D J PRET HOLDINGS (PTY) LTD

APPLICANT

and

AUTO MANIA

FIRST RESPONDENT

NEDBANK LIMITED

SECOND RESPONDENT

JUDGMENT

Mazibuko AJ

Introduction

1. The applicant seeks an order declaring the sale agreement (the agreement) concluded between itself and the first respondent concerning the selling of a Ford Raptor F150, VIN: [...] (the Ford Raptor), to be lawfully cancelled by the applicant, alternatively, the confirmation of the cancellation of the agreement by the court. An order compelling the first respondent to refund the applicant the purchase amount of R3 007 940.00 against the delivery of the vehicle.

2. Alternatively, if the court finds that there is a factual dispute, the court refers the matter for oral evidence, and the affidavits in terms of the main application under the above case number are to be regarded as pleadings in the oral evidence proceedings in so far as it relates to the issues of fact.

3. The applicant is the farming company that purchased a motor vehicle from the respondent.

4. The first respondent is the company conducting business in Midrand, Gauteng. The second respondent was cited as a party with interest in the matter. It did not participate in these proceedings. For the purposes of this judgment, the first respondent shall be referred to as “the respondent”.

Litigation history

5. In June 2022, the applicant initially launched an urgent application set down for 27 July 2022. It was struck off the roll with costs for lack of urgency.

6. The applicant filed supplemented heads of arguments. The respondent filed none after the matter was struck off from the urgent roll. The application was enrolled in an ordinary opposed motion roll.

7. The matter came before this court, and only the applicant’s counsel was present to make oral submissions. In his opening address, the counsel on behalf of the applicant submitted that he was not expecting any appearance on behalf of the

respondent as they filed a notice of withdrawal as attorneys of record on 17 January 2023.

8. Notwithstanding the applicant's attorneys of record, having deposed to an affidavit stating that no duplicate electronic court file for the matter existed on the Caselines system. During the counsel's address, it became clear that the matter was duplicated under the same case number on Caselines. The court had access to the incorrect bundle. The papers the court read did not, among others, have the notice of withdrawal and proof of service thereof the plaintiff's counsel referred to.

9. According to access granted to the court, the Caselines bundle commenced with uploads and numbers 0001 (directive compliance certificate on 21 July 2022), 0004 (index and pagination on 22 July 2022), 0005 (notice of motion on 21 July 2022), 0006 (notice of intention to oppose on 21 July 2022), 0007 (return of service on 21 July 2022), 0008 (answering affidavit on 21 and 25 July 2022), 0009 (replying affidavit on 22 July 2022), 0010 (notice of setdown on 21 July 2022), 0011 (draft order/court order on 27 July 2022), 0012 (practice notes on 21 and 24 July 2022), 0013 (heads of argument, on 22, 24 and 27 July 2022) and 0014 (list of authorities on 27 July 2022).

10. The applicant's counsel stated that the correct bundle was under the same case number on Caselines, commencing with 01 (pleadings, uploaded on 01, 19 and 27 November 2022), 02 (notices, uploaded on 7, 18, and 20 November 2022), 04 (practice notes/heads of argument, uploaded on 7, 11 and 21 November 2022), 06 (index, uploaded on 7 November 2022 and 23 January 2023), 07 (urgent application documents, uploaded on 19 January 2023), 08 (company documents, uploaded on 30 January 2023) and 09 (draft orders, uploaded on 30 January 2023).

11. The court was then granted access to the matter on the Caselines system. The applicant's counsel offered no explanation as to why there was duplication besides the assurance by the applicant's attorneys of record, as per their affidavit dated 21 July 2022. It seemed he also learned for the first time that the matter was duplicated on the Caselines system. He was not the deponent of the affidavit stating there was

no duplicate. Nor could he assist with how, for instance, one notice would be uploaded onto one e-file bundle and the next onto another.

12. I agree with Spilg J in an unreported case of H [....], J [....] E [....] (formerly B [....]) and B [....], A [....], case number 2016/10540, dated 13 September 2022, where in para 30, he stated that: *“The purpose of Rules of Court and this court’s Practice Manual is to facilitate the expeditious and fair hearing of cases in an orderly manner.”*

13. It is reasonably expected from the litigants or their instructed legal practitioners presenting their case to ensure that the papers they relied upon to prove their case are in order and that the rules and directives have been complied with. To the extent that reliance on litigants’ and instructing attorneys’ omissions and commissions when one is already presenting the case in court can not be raised as a reasonable ground in seeking the court’s indulgence for non-compliance. In my view, such non-compliance downfalls the purpose of the court rules and practice directives since it does the opposite of facilitating the expeditious and fair hearing of cases in an orderly manner.

14. In the matter of **Grootboom v National Prosecuting Authority and Another 2014 (2) SA 68 (CC)**, at para 20, the Constitutional Court stated that:

“[20], “...It is axiomatic that condoning a party’s non-compliance with the rules or directions is an indulgence. The court seized with the matter has a discretion whether to grant condonation.”

15. It is so that the applicant did not ensure there was no duplication on Caselines. The existence of two different and incomplete e-file bundles could have been avoided in light of the nature of the application and the consequences that the removal or struck-off of the matter from the roll may ultimately have. I find no facts exist suggesting prejudice in granting indulgence to the applicant.

16. My finding with regard to condonation in this matter should not be seen as a precedent. Non-compliance with any court rules and directives must be deplored in

the strongest possible terms as it delays matters and causes unnecessary inconveniences.

Factual matrix

17. On 22 March 2022, the applicant and the respondent concluded a sale agreement. In terms of which the applicant purchased a Ford Raptor. On 24 March 2022, the motor vehicle was delivered to the applicant.

18. After delivery, the applicant noted the Ford Raptor was not a 2019 model as advertised but a 2018. The explanation the respondent proffered was that it was imported to South Africa in 2019.

19. The other defects were the following;

19.1. The mileage reading was 24 000 KM, not 14 000 KM as advertised. In response, the respondent stated that the difference in mileage occurred when the odometer was changed from miles to kilometres.

19.2. The windscreen was not replaced. It was explained by the respondent that the windscreen replacement was delayed due to Covid 19.

19.3. The rims were severely damaged. The respondent suggested the applicant would sell the rims, and the respondent would pay the difference between the price received from the sale by the applicant and that of replacement.

19.4. The engine warning light was reflecting continuously. The warning light regularly appeared, indicating "trailer connected or disconnected or side sensors not working". The respondent stated they would repair the warning lights at their cost.

19.5. Considering the traces of body filler and overspray on the side of the bonnet and front beam over the radiator, the motor vehicle appeared to have been involved in a collision or was modified. The traces of body filler and overspray

were due to the conversion from left-hand drive to right-hand drive, as per the explanation given by the respondent.

20. On 13 April 2022, the applicant cancelled the agreement by dispatching an email to the respondent. It also, through its attorneys, requested the signed sale agreement, NATIS documentation, and the licence and number plates from the respondent, which needed to be provided.

21. The respondent was also advised that the provided temporary permit had expired, rendering the Ford Raptor, not of any use and assistance to the applicant.

Applicant's case

22. On behalf of the applicant, it was argued that there were material differences between the specs of a 2018 and a 2019 model regarding the suspension, powertrain, shocks and offroad cruise control system, which significantly impacted the purchase price. The motor vehicle model was an essential term of the sale agreement. Thus, the respondent breached a material term of the sale agreement.

Defendant's case

23. In his answering affidavit, the respondent stated that they admitted the content of the CARFAX report annexed to the applicant's founding affidavit. However, they stated that the applicant knew the vehicle was a 2019 model. Also, the applicant would have still purchased the car even if it had known it was a 2018 model.

Issues

24. The court is to determine whether the respondent breached the agreement in the manner suggested by the applicant and whether, due to the breach, the agreement was properly cancelled. Also, whether the applicant is entitled to be repaid the full amount paid to the respondent under the agreement.

The Law

25. In *Extel Industrial (Pty) Ltd & Another v Crown Mills (Pty) Ltd*¹, it was held that

“The rule that an innocent party who elects to rescind may not do so if he tenders restitution is not an inflexible one. It applies only where such restitution remains physically possible. When through no fault of the rescinding party, restitution is no longer possible, the rescinding party is not precluded by the fact alone from resiling.

732B “.... That a tender of restitution, or the explanation and excuse for its failure, is a requirement in the proceedings for restitution is indeed trite.”

Breach

26. With regard to the alleged breach, it was uncontested that the respondent failed to deliver the 2019 Ford Raptor. Instead, it delivered a 2018 model. The mileage reflected on the advert was 14 000 KM; however, on delivery, the applicant received it with the reading of 24 000 KM.

27. The respondent contended that the agreement was never properly cancelled and disputed facts needed to be ventilated in an open court, not on paper.

28. Regarding the material disputed facts of the matter. On the evidence, the respondent did not contend the existence of defects in the vehicle. Instead, they offered to either repair at their costs or pay. The applicant stated that it relied on the advert, and had it known of the defects, it would not have purchased the vehicle and had it delivered to it. The defects are material, according to the applicant. The respondent also did not argue that it should be excused from returning what it received from the applicant. Nor do they dispute the defects.

29. Cancellation of a contract is a drastic remedy which usually allows a party to terminate an agreement when the other party has committed a serious breach that

¹ 1999(2) SA 719 (SCA) at 731D-E

deserves ending a contract. A party is awarded cancellation for a sufficiently serious or material breach, depending on the nature and seriousness of the breach. Where the breach is material or significant, the aggrieved party can terminate the contract by cancelling it. The onus of proving the breach is material lies on the party asserting it.

30. All the aforementioned evidence shows that the requirements of a breach were fully satisfied. I find that the respondent breached the agreement as contended by the applicant. No fault can be attributed to the applicant cancelling the agreement. The applicant was entitled to cancel the agreement as it became evident that the respondent misrepresented the material facts and conditions of the motor vehicle it sold to the applicant. The vehicle model advertised was 2019, whereas it was known to the respondent that it was a 2018 model. The correct mileage on delivery of the vehicle was 10 000 KM more than what was advertised. The respondent knew this factor. It cannot be accepted, as the respondent would like the court to, that on conversion from miles, the kilometres moved from 14 000 to 24 000, as such conclusion is incorrect.

Repayment

31. It is generally accepted that the rules regarding restitution are substantially the same whether such restitution is coupled with the nullification of a contract based on misrepresentation, undue influence or duress; or follows on rescission because of a latent defect or breach of contract. In the absence of an agreement on the contrary, each party is, on rescission, bound to restore to the other that which he has received in terms of the contract. See *The Law of South Africa* 5(1) r 256. The rule is founded on equity and will be departed from where justice requires such departure. See *Feinsten v Niggli* 1981(2) SA 684(A) at 700F to 701C.

32. It is so that the party that wants to be discharged bears the onus to show why the primary obligation of the restitution must not be complied with. The respondent is, therefore, required to prove why they must be excused from giving back what they received from the applicant in the sale agreement.

33. The applicant seeks repayment of the amount it paid to the respondent in full since the vehicle it received from the respondent is not what was advertised and paid for and is of no use to it.

34. On the evidence, it cannot be said that the applicant received the Ford Raptor, 2019, with a mileage of 14 000 kilometres as advertised. The vehicle received

by the applicant was a 2018 model with reading kilometres 10 000 more than what was advertised. I found the averments by the respondent that even if the vehicle model were 2018, the applicant would still have bought it speculative and baseless and, therefore, untrue. The matter is before the court because the applicant did not accept the 2018 model as it paid for the 2019 model.

35. In its founding and replying affidavits, the applicant stated that such misrepresentation was a material breach of the agreement. Thus, it cannot be true that the applicant would still have settled for the model older than the one he paid for. The respondent presented no cogent facts as to why it should not be ordered to pay the purchase amount to the applicant in full. Considering the evidence presented, the applicant is entitled to be repaid the amount paid to the respondent as a purchase price in full.

36. In conclusion, I find that the applicant was entitled to cancel the agreement due to the material breach of contract by the respondent. The agreement was properly cancelled. Consequently, the applicant is entitled to be repaid the total amount paid to the respondent under the agreement.

37. Consequently, the application succeeds. The following order is made.

Order:

1. The sale agreement concluded between DJ Pret Holdings (Pty) Ltd and Auto Mania CC with regard to the sale and purchase of a Ford Raptor F150, Vin number: [...], is cancelled.

2. Auto Mania CC will refund DJ Pret Holdings (Pty) Ltd an amount of R3 007 940.00.

3. DJ Pret Holdings (Pty) Ltd pays the costs of suit.

N. MAZIBUKO

Acting Judge of the High Court of South Africa

Gauteng Division, Johannesburg

This judgment was handed down electronically by circulation to the parties' representatives by email being uploaded to Case Lines.

Representation

For the applicant:

Mr L Hollander

Instructed by:

Theron Jordaan & Smit Inc

For the first respondent:

No appearance on the hearing day.

Instructed by:

Hearing date:

30 January 2023

Delivery date:

14 March 2023