



IN THE HIGH COURT OF SOUTH AFRICA

FREE STATE DIVISION, BLOEMFONTEIN

Case No. A141/22

In the matter between:

Herman Arnold Lensing Van Der Heever

Appellant

and

Johannes Guiseppes Vergottini

Respondent

CORAM: Mbhele DJP et Gusha, AJ

JUDGMENT BY: Gusha, AJ

DELIVERED ON: This judgment was delivered electronically by circulation to the parties' representatives by way of email. The date and time for delivery is deemed to be at 12h00 on 14 April 2023.

JUDGMENT

- [1] This matter came before us on appeal from the Bloemfontein Magistrate's Court, the court *a quo*. The appeal lies against the decision of the court *a quo* in which absolution from the instance at the close of the plaintiff's case was granted. For the sake of convenience I shall refer to the parties as they were cited in the court *a quo*.
- [2] The plaintiff is an adult natural person who plies his trade as a sales representative. The defendant is an adult natural person who plies his trade as sole proprietor of H&R Car Wholesalers, a used car dealership.
- [3] Prior to the submissions on the merits by the parties, the defendant sought an order condoning the late filing of his heads of arguments, advancing a plethora of what I can only deem to be excuses. Nonetheless, as the delay in filing was a mere four days and thus not inordinate, we could find no prejudice to the plaintiff (in any event none was alleged) this court granted the indulgence. I shall therefore not take this matter any further than I have. I would, however, be remiss if I do not remark that this practice is to be frowned upon.
- [4] The germane facts giving rise to the dispute between the parties are the following; the parties entered into a sale agreement in terms of which the plaintiff purchased a used motor vehicle from the defendant. Mere hours, after taking delivery of the vehicle, the plaintiff experienced mechanical problems therewith as the vehicle would not start. After being notified, the defendant caused the vehicle to be repaired by a Mr Mouton, a mechanic in the employ of the defendant. This however proved to be short-lived as the plaintiff experienced, in the following days, intermittent mechanical failures with the vehicle, ranging from the vehicle not starting, overheating, stalling etc. The plaintiff informed the defendant that due to the recurrent mechanical failures he wanted to cancel the

sale agreement and return the vehicle. The defendant however refused and once more offered to repair the vehicle at his own cost.

- [5] Subsequent to causing the vehicle to be collected from the plaintiff, ostensibly to effect repairs thereon, the defendant made an about turn and informed the plaintiff that he was no longer willing to repair the vehicle at his own cost, as a subsequent compression test revealed that the vehicle's pistons and sleeve were destroyed due to possible over-revving of the vehicle. Eager to get his vehicle back, the plaintiff effected payment for the repairs to the vehicle's engine. Once more Mr Mouton, worked on the vehicle and when same was again operable it was handed back to the plaintiff. However these latest "repairs" too, proved futile as the vehicle broke down again. The plaintiff hereafter stopped driving the vehicle.
- [6] During the trial the plaintiff also led the evidence of an expert witness, Mr Ras a diesel mechanic. Concisely his evidence was that, an inspection he conducted on the vehicle some three weeks before the trial, revealed that the vehicle had numerous mechanical defects, paramount of which was a defective injector which gave rise to the piston damage, which in turn rendered the vehicle largely inoperable.
- [7] In moving this appeal, the plaintiff primarily submitted that the court *a quo*, erred in granting absolution from the instance at the close of the plaintiff's case. It was further submitted that the evidence led clearly established the presence of defects, from the day the vehicle was purchased and beyond. It was further submitted that on a correct application of the test for absolution from the instance as well as the provisions of the Consumer Protection Act¹, (the Act) to the facts of this case, the court *a quo* should not have granted absolution from the instance.
- [8] The defendant in opposition, nailed his colours to the mast of the provisions of the Act, specifically section 56 (1) and (2) thereof. It was primarily submitted on his behalf that due to the repairs made by Mr Mouton to the engine of the

¹ Act 68 of 2008

plaintiff's vehicle, the exclusionary proviso of the implied warranty as guaranteed in section 56(1) of the Act was triggered, as the goods were now altered contrary to the instructions of the defendant and or after leaving his control.

[9] The primary issue that this court is called upon to determine is whether the court *a quo* erred in granting absolution from the instance.

[10] In order to answer the aforesaid I can do no better than have regard to the *locus classicus* **Claude Neon Lights (SA) Ltd v Daniel**² wherein the court held that;

“... when absolution from the instance is sought at the close of plaintiff's case, the test to be applied is not whether the evidence led by plaintiff establishes what would finally be required to be established, but whether there is evidence upon which a Court, applying its mind reasonably to such evidence, could or might (not should or ought to) find for the plaintiff.”

[11] The court in **Gordon Lloyd Page & Associates v Rivera and Another**³ cited the Claude Neon Lights judgment with approval and held as follows;

“This implies that a plaintiff has to make out a prima facie case in the sense that there is evidence relating to all the elements of the claim to survive absolution because without such evidence no court could find for the plaintiff... As far as inferences from the evidence are concerned, the inference relied upon by the plaintiff must be a reasonable one, not the only reasonable one... Having said this, absolution at the end of a plaintiff's case, in the ordinary course of events, will nevertheless be granted sparingly but when the occasion arises a court should order it in the interests of justice.”

[12] The court *a quo* framed the issue it was called upon to determine after the closure of the plaintiff's case thus;

“I am called upon to determine whether or not upon evidence presented at the close of the plaintiff's case an application for absolution from the instance can be granted and whether there are latent defects on the vehicle....”

² 1976 (4) SA 403 (AD) at 409 G – H see also Build-A-Brick BK en 'n Ander v Eskom 1996 (1) SA 115 (O) at 123

³ [2000] 4 ALL SA 241 (AD) at 243 B:

[13] This approach was manifestly erroneous, the essential issue that should've been considered, at the close of the plaintiff's case, was whether the plaintiff had discharged the onus of showing the existence of a *prima facie* case against the defendant⁴. Had the court *a quo* followed the approach as set out in Claude Neon Lights *supra*, it would not have granted absolution, as the evidence before court patently evinced that the defendant had a *prima facie* case to answer.

[14] The used motor vehicle purchased by the plaintiff, at the time of purchase, fell squarely within the protection afforded to all consumers by section 55 and 56 of the Act. As can be gleaned from hereunder, these 2 sections ought to be read together and not in isolation, (as it would appear the defendant did). Section 56 flows from section 55. In my view even before the implied warranty as provided for in section 56(1) becomes applicable, the consumer, at the time of purchase, is already imbued with the right to receive goods that are reasonably fit for purpose as provided for in section 55. The relevant sections provide as follows;

55. (1) ...

55. (2) Except to the extent contemplated in subsection (6), every consumer has a right to receive goods that—

(a) are reasonably suitable for the purposes for which they are generally intended;

(b) are of good quality, in good working order and free of any defects;

(c) will be useable and durable for a reasonable period of time, having regard to the use to which they would normally be put and to all the surrounding circumstances of their supply; and...

56. (1) In any transaction or agreement pertaining to the supply of goods to a consumer there is an implied provision that the producer or importer, the distributor and the retailer each warrant that the goods comply with the requirements and standards contemplated in section 55, except to the extent that those goods have been altered contrary to the instructions, or after leaving the control, of the producer or importer, a distributor or the retailer (my emphasis), as the case may be.

⁴ Marine & Trade Insurance Co Ltd v Van der Schyff 1972 (1) SA 26 (A) at 37G-38A

(2) Within six months after the delivery of any goods to a consumer, the consumer may return the goods to the supplier, without penalty and at the supplier's risk and expense, **if the goods fail to satisfy the requirements and standards contemplated in section 55 (my emphasis)**, and the supplier must, at the direction of the consumer, either—
 (a) repair or replace the failed, unsafe or defective goods; or (b) refund to the consumer the price paid by the consumer, for the goods...

- [15] From the facts placed before the court *a quo*, the vehicle purchased by the plaintiff was never fit for purpose, it wouldn't start, it stalled etc. Albeit the vehicle in question was bought as a used vehicle, the expectation was that it was reasonably fit for purpose, in other words driveable, *in casu*, this vehicle never was. It had only travelled for about 7 kilometers when it broke down. On this aspect alone, the court *a quo* ought not to have granted the application for absolution. The misery for the plaintiff however did not end there, for even after the vehicle's engine (pistons) were repaired by Mr Mouton, the vehicle broke down again.
- [16] Even on the reliance placed by the defendant on section 56(1), still the plaintiff had set forth a *prima facie* case. In the circumstances of this case, it can never follow that that vehicle has been altered contrary to the instructions of the defendant, or after leaving his control. Mr Mouton is a mechanic who was employed by and acted under the direction of the defendant. At the time Mr Mouton worked on the engine, the vehicle was under the control of the defendant, it was after all taken to the workshop at the latter's behest. The fact that he now somehow refuses to pay for the repairs in this regard, is in my view, of no consequence.
- [17] It is after all an established principle of our law that a court should be wary to grant absolution from the instance at the close of the plaintiff's case, as it should not at that stage, evaluate and reject the plaintiff's evidence. It must instead assume that in the absence of very special considerations, such as the inherent unacceptability of the evidence, the evidence presented is true⁵. *In casu*, on a

⁵ Atlantic Continental Assurance Co. of S.A. v Vermaak 1973 (2) SA 525 (ECD) at 527 C)

careful reading of the transcribed record, we could find no instance of any special considerations, even on the version as advanced by Mr Ras.

[18] Resultantly, I make the following order:

18.1. The appeal succeeds with costs, which costs shall include costs of counsel.

18.2. The order of the court *a quo* is substituted with the following order:

18.2.1 Application for absolution from the instance is dismissed.

NG Gusha, AJ

Mbhele DJP

On behalf of the applicant

Instructed by:

Adv. W.A Van Aswegen

McIntyre Van Der Post

BLOEMFONTEIN

On behalf of the respondent:

Instructed by:

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