IN THE HIGH COURT OF SOUTH AFRICA
(FREE STATE DIVISION, BLOEMFONTEIN)

Case no. 5476/2019
Reportable: YES/NO
Of Interest to other Judges: YES/NO
Circulate to Magistrates: YES/NO

In the matter between:

MISTY SEA TRADING 296 (PTY) LTD
t/a PROJECT LOGISTICS MANAGEMENT Plaintiff

and

ROUTE MANAGEMENT (PTY) LTD t/a BUSAF BAUER Defendant

<u>CORAM:</u> **POHL, AJ**

<u>HEARD ON</u>: **25, 26, 28 OCTOBER 2022 & 28, 29 MARCH 2023**

DELIVERED ON: **20 June 2023**

<u>INTRODUCTION:</u>

[1] The Plaintiff in this matter is in the logistics and transport business. The Defendant in this matter *inter alia* designs and manufactures truck trailers for use in different transport applications.

[2] During September 2017, the Plaintiff approached the Defendant to design and manufacture a so-called tri-axle step deck trailer for use in Plaintiff's transport business. The Defendant then duly designed and manufactured the said trailer and supplied same to the Plaintiff during March 2018.

[3] The Plaintiff's case is that the said trailer suffers from latent defects. The Plaintiff consequently returned the trailer to the Defendant and instituted action against the Defendant for repayment of the purchase price based on the *actio redhibitoria* and argued further that it is entitled in the alternative, to damages based on breach of contract if the Court does not find in its favour on the *actio redhibitoria.*

[4] The Plaintiff in this matter was represented by Adv S. Hoar and the Defendant was represented by Adv W.J.Groenewald.

<u>BACKGROUND AND FACTUAL MATRIX:</u>

[5] The Plaintiff's particulars of claim consists of two claims. At the outset of the trial Mr Hoar however indicated that the Plaintiff does not persist with claim 2. The only claim thus to be adjudicated by this Court is claim 1 for the repayment of the purchase price in the amount of **R564 300.00** plus costs, as well as the costs pertaining to the Defendant's unsuccessful application for an order of absolution from the instance, lodged by it after close of the Plaintiff's case.

[6] The Plaintiff's case is that in acquiring the trailer, the Plaintiff approached Capital Acceptances (Pty) Ltd t/a Reichmans Capital (hereinafter referred to as "Reichmans Capital"), to "*finance*" its acquisition of the trailer.

[7] Plaintiff contends that pursuant to its application for finance, Reichmans Capital purchased the trailer from the Defendant during March 2018 and leased it to the Plaintiff in terms of a written lease concluded between them.

[8] Consequently, and prior to instituting proceedings against the Defendant, the Plaintiff took cession of Reichmans Capital's right, title and interest as purchaser in and to the sale agreement concluded between Reichmans Capital and the Defendant in respect of the trailer.

[9] The Defendant denies having sold the trailer to Reichmans Capital, it contends that it concluded an agreement with the Plaintiff , as opposed to Reichmans Capital, and did so during December 2017 in terms of which it sold the trailer to the Plaintiff, subject to its standard terms and conditions, and that the invoice for the trailer would be made out to Reichmans Capital. The Defendant further contends that it complied with its obligations in terms of the sale agreement with the Plaintiff, denies any breach of any sale agreement with Reichmans Capital, denies that there are any defects in the trailer and contends that the trailer was built according to instructions, specifications and dimensions specified and/or provided by the Plaintiff to the Defendant.

[10] During the course of the trial, the Plaintiff led a number of witnesses and the Defendant led a number of witnesses. From this evidence as well as the documentary evidence placed before the Court, it appears that it is common cause that during or about September 2017, the Plaintiff approached the Defendant to design and manufacture a specific trailer for use in the Plaintiff's logistics and transport business. The Plaintiff required:

10.1 A flat-bed step-deck trailer;

10.2 with a deck-height of 950 mm;

10.3 the combination length of which (the total length when coupled to a truck-tractor) was to be within the legal limit of 18.5 metres.

[11] It is the Plaintiff's case that at the time the Plaintiff approached the Defendant, the Defendant held itself out to be:

11.1 An expert in advising on the design manufacture and supply of truck-trailers for use in different transport applications;

11.2 A merchant/dealer/seller/manufacturer of specialized truck-trailers and accessories; and

11.3 Capable of manufacturing specialized trailers, providing warranties on the trailers manufactured by it and attending to any repairs in respect of trailers manufactured and/or supplied by it.

[12] During September 2017 the Defendant's representative, Barné Vijoen ("*Viljoen*") furnished the Plaintiff's representatives John Du Bourg ("*Du Bourg*") and Carl Webb ("*Webb*") with a quotation and accompanying drawing bearing drawing number GA3649, for the supply and manufacture of a new tri-axle step-deck trailer at a price of R495 000.00 plus VAT (R564 300.00) ("*the September quotation*").

[13] On 6 November 2017, Du Bourg advised Viljoen that the Plaintiff would like to order the step-deck trailer in the September quotation, but asked what the costs would be to change the axles to 13 ton axles. The Defendant confirmed that there would be no additional costs for the 13 ton axles and the Plaintiff requested the Defendant to build the trailer with 13 ton axles.

[14] The Plaintiff then approached Reichmans Capital to finance its acquisition of the trailer. Consequently on 13 November 2017, Du Bourg sent an e-mail to Viljoen that was copied to Willem van Niekerk ("*Van Niekerk*"), the representative of

Reichmans Capital so that Viljoen could liaise directly with Van Niekerk regarding the Plaintiff's acquisition of the trailer.

[15] Thereafter Viljoen and Van Niekerk liaised with one another directly. Van Niekerk requested that Viljoen send him a copy of the quotation for the trailer that was to be manufactured and supplied to the Plaintiff. Viljoen obliged and sent through to Van Niekerk the September quotation. Having received the September quotation from Viljoen, Reichmans Capital approved the transaction.

[16] Subsequent to Reichmans Capital having approved the transaction, Webb and Viljoen had further discussions, resulting in the generation of a quotation dated 13 December 2017, accompanied by drawing number GA3641.1 ("*the December quotation*"). The September quotation and the December quotation have minor differences which do not affect the outcome of this trial.

[17] During or about March 2018 the Defendant delivered the trailer, with 13 ton axles and suspension, to the Plaintiff and corresponded directly with Reichmans Capital once more.

[18] The Defendant invoiced Reichmans Capital for the trailer. *Ex facie* the tax invoice which appears at page 49 of Exhibit "A, the invoice is made out to Reichmans Capital and it also contains the reference that "delivery on you [sic] behalf to: Misty Sea Trading 296 (Pty) Ltd", i.e. the Plaintiff, whose particulars is then contained in that box. Reichmans Capital's VAT number appears on the invoice and VAT is indeed contained in this invoice in the amount of R69 300.00.

[19] Reichmans Capital insisted that the Defendant register ownership of the trailer in Reichmans Capital's name and to do so before making payment of the purchase price reflected in the Defendant's invoice.

[20] Ownership of the trailer was registered in Reichmans Capital's name thereafter:

20.1 Reichmans Capital then concluded a finance lease with the Plaintiff in terms of which the Plaintiff leased the trailer from Reichmans Capital; and

20.2 Reichmans Capital also paid the full purchase price to the Defendant.

[21] Paragraph 3.1 of the lease agreement between Reichmans Capital and the Plaintiff provides that Reichmans Capital shall remain the owner of the goods as described in the schedule.

[22] Clause 1.4 of the lease agreement furthermore provides that the Plaintiff would accept delivery of the trailer on Reichmans Capital's behalf after a proper inspection of the trailer, which acceptance would have the effect that ownership of the trailer would pass to Reichmans Capital. According to Mr Webb, the managing director of the Plaintiff, the ownership of the trailer then in turn, and much later passed from Reichmans Capital to the Plaintiff on 31 March 2021 after the Plaintiff paid all monies due to Reichmans Capital in terms of the lease.

[23] After taking delivery of the trailer, the Plaintiff encountered various problems with the trailer and raised these issues with the Defendant. While some of the issues were resolved, three (3) issues remain unresolved. The Plaintiff complained that:

23.1 when the trailer was coupled to a truck-tractor of the Plaintiff, the combination length exceeded the maximum legal combination length of 18.5 metres;

23.2 the lower-deck of the trailer did not run level when the trailer was coupled to Plaintiff's truck-tractors;

23.3 the trailer's suspension (specifically the trailing arms) snagged on the ground when the trailer was being reversed or when the trailer was being towed forward over gate rails, speed bumps and the like.

[24] These issues remained unresolved and the Plaintiff ultimately instituted the present action against the Defendant for cancellation of the sale agreement and return of the purchase price.

[25] The Plaintiff's case is that Reichmans Capital, on 15 March 2019 ceded to the Plaintiff all of its rights in terms of the sale agreement it concluded with the Defendant. The Plaintiff led a number of witnesses in this regard and also handed in the specific written cession, which cession also appears as annexure "POC5" to the Plaintiff's particulars of claim.

[26] When the Plaintiff approached the Defendant for the design of this particular trailer, the Defendant presented the Plaintiff's representatives with three (3) different sketches of three similar trailers it had designed in the past. These sketches are contained at pages 6 to 8 of exhibit "A". These sketches contain measurements of the different trailers when coupled to different truck-tractors. The first of the sketches indicate that the trailer is to be drawn by a "*Freightliner Argosy 6 x4 truck-tractor*". The second of the sketches indicate that the trailer is to be drawn by a "*SATB 6 x 4 truck-tractor*". The third of the sketches indicate that the trailer is to be drawn by a "*Volvo FH 480 6 x 4 truck-tractor*".

[27] The coupling point where the trailer is hitched to the specific truck-tractor, is known as the fifth wheel. The fifth wheel positions differ from truck-tractor to truck-tractor. As a general rule and because of the fact that the dimensions of the different truck-tractors' cabs as well as the fifth wheel positions differ, the total combination length of the trailer when hitched to a truck-tractor therefore may differ. It is however conceivable that certain different truck-tractors have the same dimensions. The Plaintiff however presented evidence to the effect that it received a number of traffic

fines from traffic authorities because the combination length exceeded 18.5 metres when this specific trailer was hitched to its truck-tractors.

[28] It needs to be mentioned that the sketch which was the basis of the Plaintiff's acceptance of the Defendant's design was the sketch contained at page 8 of Exhibit "A". It is the same as annexure POC 3 to the particulars of claim. This trailer in this sketch is hitched to the Volvo FH 480 6 x 4 truck-tractor. The combination length on the sketch is 18.487 metres, thus within the legal limit of 18.5 metres and thus within the legal limit for non-extraordinary vehicles. The evidence presented by the Plaintiff indicates that it did not have such a Volvo FH 480 6 x 4 truck-tractor. Instead it had mostly Mercedes Benz truck-tractors as well as a different Volvo truck-tractor.

[29] The evidence of Mr Webb was that the Plaintiff pulled this specific trailer with a Mercedes Benz truck-tractor. The Plaintiff also had a Volvo FH 440 truck-tractor in its fleet.

[30] Mr Webb also conceded that the fifth wheel height on different truck-tractors may also differ. That entails that the coupling point of the trailer to the truck-tractor differs in height from truck-tractor to truck-tractor. The trailer in question is a rigid structure. That then consequently has a bearing on the slope or angle of the deck of the trailer when hitched to different truck-tractors. It must be remembered that one of the Plaintiff's main complaints was the deck of the trailer so designed by the Defendant did not run level when hitched to its truck-tractors. The evidence was that it in fact ran "uphill" at an angle from the back to the front.

[31] The Plaintiff adduced the expert evidence of a Mr Flynn. He is a metallurgist who owns an engineering business in Springs. He has been manufacturing abnormal trailers for the past 20 years and engineering equipment for the past 40 years. He inspected the trailer at the Defendant's premises in Bloemfontein and compared it to the sketchplan with number GA 3649 referred to above. He confirmed that the trailer conformed to the dimensions depicted in the said sketchplan. During his inspection the trailer was not hitched to any truck-tractor and was standing in the mud. The

trailer's air suspension was deflated. In the premises he could *inter alia,* not physically confirm the trailers ride height or elevation of the deck.

[32] After the Plaintiff approached the Defendant with the problems it had with the trailer, the Defendant had a certain Mr Oelofse prepare a report. According to the evidence presented by the Defendant, it did so in an attempt to provide suggestions of how the Plaintiff's concerns could be addressed.

[33] According to the report of Mr Oelofse, which is found at page 85 to 99 of exhibit A, the trailing arms of the suspension of the trailer was at a height of 97mm from the ground. The trailing arms are the lowest point of the suspension. This is central to the Plaintiff's complaint, as testified by Mr Webb, namely that the trailer was snagging as indicated in paragraph 23.3, supra. It must be mentioned that it was never put to Mr Webb when he testified that the trailer did not snag when it was reversed.

[34] The Defendant called a certain Mr Niewoudt as an expert witness. He has a diploma in mechanical engineering and applied mathematics he obtained from the Central University of Technology, Free State. He previously worked for the Defendant where he designed trailers and he helped with the manufacturing process. He also inspected this trailer after it was returned by the Plaintiff. Mr Niewoudt found that the trailer thus designed by the Defendant was in fact designed in accordance with the schetchplan with number GA 3649.1.

[35] Mr Niewoudt found that if the trailer was hitched to a Volvo FH480 6 X 4 truck-tractor, the combination length would be 18,487 metres and thus within the abovementioned limit of 18.5 metres. He further testified that if the trailing arms of the suspension sits at a height of 97mm from the ground, it "*would be sufficient for this trailer to be used on a flat road and reasonable road conditions".* He however conceded in cross examination that many South African roads have speed bumps. He also agreed that when these trailers gets loaded and off loaded they go into loading yards and cross railway lines and bridges. Mr Niewoudt agreed that the

trailing arms of the trailers should not snag. He however attempted to justify the 97mm clearance, referred to in paragraph [33], supra, by testifying that "*the circumstances around the usage of the vehicle will determine what clearance is needed".*

[36] Mr Niewoudt was asked in cross examination in the context of the combination length, whether it was not necessary for the Defendant in designing the trailer to know what truck-tractors the Plaintiff was using. He replied that it was not necessary as long as the "clients" were using standardized (generic) truck- tractors. He however agreed that the Defendant did not use the dimensions of a generic truck-tractor in its design of the Plaintiff's trailer.

[37] As indicated in paragraph [9], supra, the Defendant denied in evidence and in its plea, that it concluded any sale with Reichmans Capital. It contended that it concluded the sale with the Plaintiff and because it did so its standard terms and conditions are applicable to their contract. The standard terms and conditions *inter alia* provides that the Defendant would not be liable to the Plaintiff should the goods (trailer) so supplied not be suitable for the purpose required by the Plaintiff, whether or not such purpose was made known to Defendant. The terms and conditions do not exclude the Defendant from liability for latent defects. The Defendant in any event did not plead that the standard terms and conditions were applicable to the sale agreement with Reichmans Capital.

[38] The trailer was delivered to the Plaintiff during March 2018 and it was returned by Plaintiff to the Defendant some five months later on 21 August 2018. According to the evidence of Mr Webb the Plaintiff used the specific trailer mainly on the route between Durban and Johannesburg. Hence the fact that the Plaintiff received five or six fines for the excessive overall combination length at either Warden or Mooi River. It appears from the evidence of the Defendant's expert witness Mr Niewoudt thet the trailer in question was fitted with a so-called "Hub Odometer". It measures or reflects the distance the trailer had travelled. He testified that upon his inspection of the trailer that according to the odometer it had travelled some 58 000

km. This fact (58 000km) was not put to any of the Plaintiff's witnesses. No evidence was adduced as to whether or not the trailer was used after its return to the Defendant.

<u>THE ISSUE OF WHETHER THE TRAILER WAS SOLD TO THE PLAINTIFF OR TO REICHMANS CAPITAL:</u>

[39] The first issue that falls open for decision is whether or not the Defendant sold the trailer to Reichmans Capital or to the Plaintiff. In this regard it is first of all important to have regard to the fact that it is common cause from the evidence presented in this Court that the purchase price was paid to the Defendant by Reichmans Capital and not by the Plaintiff. It is secondly important to have regard to the fact that the Defendant issued a tax invoice. From this tax invoice the invoice was made out to Reichmans Capital and not to the Plaintiff. The invoice bears the VAT number of Reichmans Capital and not the Plaintiff. *Ex facie* this tax invoice the delivery of the trailer was done to Reichmans Capital but accepted on its behalf by the Plaintiff.

[40] It is clear from the lease agreement as referred to in paragraphs 21 and 22 *supra*, that Reichmans Capital became the owner and remained the owner of the trailer until such time as the Plaintiff paid the last payment in terms of the said lease agreement. It is trite law that you can never transfer more rights to another than what you originally possessed. As indicated above, the full payment was done by Reichmans capital to the Defendant and the transfer of the movable property (the trailer) was done from the Defendant to Reichmans Capital, although the physical handing over of the trailer was accepted by the Plaintiff, it was done on Reichmans Capital's behalf. If one therefore has regard to the common law requirements for the transfer of ownership of moveable property, the ownership of the trailer passed from the Defendant to Reichmans Capital and not to the Plaintiff. (See: **<u>Mondi South Africa Ltd v Martens and another</u> 2012 (2) SA 602 (KZP)**)

[41] The abovementioned conclusion is furthermore fortified by the fact that the Defendant registered Reichmans Capital as the owner (title holder) of the trailer on the E-Natis system. Only after Reichmans Capital was registered as the owner of the trailer on the E-Natis system did it pay the Defendant the purchase price of the trailer. Only thereafter and when Reichmans Capital was already registered as the owner of the trailer on the E-Natis system, did it conclude the finance lease with the Plaintiff.

[42] Both the witnesses Mr van Niekerk and Mr Oliviera testified that Reichmans Capital insisted that the trailer be invoiced and sold to it so that it would acquire ownership of the asset before leasing it to the Plaintiff. They told the Court that it was imperative for Reichmans Capital to acquire ownership of the trailer as it serves as Reichmans Capital's security in the finance transaction that it intended concluding with its client, the Plaintiff. This evidence was not contested by the Defendant.

[43] The significance of the tax invoice referred to earlier is furthermore of extreme importance. The tax invoice in question, complied with the provisions of the Value Added Tax Act, of 1991 ("*the VAT Act*"). (My emphasis) Tax invoice is defined in the VAT Act as being a document provided as required by Section 20 of the VAT Act. Section 20 requires that a supplier when making a taxable supply to a recipient, within twenty one (21) days of the supply, issue a tax invoice containing the particulars specified in Section 20(4) of the VAT Act. These particulars require that the tax invoice contain the words "*TAX INVOICE*" or "*VAT INVOICE*" on it, the name, address and VAT number of both the supplier and the recipient, and an individualized serial number, a full description of the goods supplied, the quantum or volume of the goods supplied and the value of the supply. The term "*supply*" is defined in the VAT Act as including performance in terms of a sale and all other forms of supply.

[44] The only evidence before the Court as to why the Defendant supplied the trailer to Reichmans Capital is that the trailer was purchased by Reichmans Capital. No reliable alternative version has been advanced by the Defendant as to why it supplied Reichmans Capital with and invoiced it for the trailer. In the premises I find that the Defendant sold the trailer to Reichmans Capital for R564 300.00, that the

trailer would be fit for the purpose for which it was manufactured and sold and in doing so the Defendant was well aware of the fact that:

44.1 The acquisition of the trailer was not for the use and benefit of Reichmans Capital;

44.2 Reichmans Capital was financing the trailer that would be supplied to the Plaintiff;

44.3 The Plaintiff would use the trailer in the conduct of its transport and logistics business.

THE CESSION:

[45] The evidence of the witness Mr Duncan Rowe, and the cession document itself which is found at p. 120 to 122 of Exhibit "A" clearly establish that Reichmans Capital ceded to the Plaintiff all of its right, title and interest, as purchaser in and to the sale agreement. The production in evidence by the Plaintiff of the written cession document serves as *prima facie* proof of its existence and the onus thereafter rests on the Defendant to disprove the cession. The Defendant failed to do so. (See in this regard: **Hippo Quarries v Eardley 1992 (1) SA 867 (A) at p. 873**).

THE *ACTIO REDHIBITORIA* AND/OR BREACH OF CONTRACT:

[46] From the decision of **Mkhize v Lourens and another, 2003 (3) SA 292 (T) at 294 B**, it is clear that in an action based on the *actio redhibitioria*, a purchaser must allege and prove that:

46.1 The object sold has a defect which, viewed objectively, substantially impaired the object's utility or effectiveness for the purpose for which it was sold or for which it was commonly used;

46.2 The defect existed at the time of the sale;

46.3 The defect was latent and <u>not visible or discoverable upon inspection;</u> (My emphasis)

46.4 The purchaser was unaware of its existence;

46.5 The purchaser would not have purchased the object had he known of the defects; and

46.6 The purchaser is willing and able to make restitution.

[47] The following important *dicta* appears from the decision of **<u>Holmdene Brick Works v Roberts Construction</u> 1977 (3) SA 670 (A) at p. 683 – 684**:

"*A merchant who sells goods of his own manufacture or goods in relation to which he publically professes to have attributes of skill and expert knowledge is liable to the purchaser for consequential damages caused to the latter by reason of any latent defects in the goods. Ignorance of the defect does not excuse the seller. Once it is established that he falls into one of the abovementioned categories, the law irrefutably attaches this liability to him, unless he has expressly or impliedly contracted out of it…*

The liability is additional to, and different from the liability to redhibitorium relief which is incurred by a seller of goods found to contain a latent defect …

Broadly speaking in this context, a defect may be described as an abnormal quality or attribute which destroys or substantially impairs the utility or effectiveness of the res vendita, for the purpose for which it has been sold or for which it is commonly used …

Such a defect is latent when it is one which is not visible or discoverable upon an inspection of the res vendita."

[48] The fact of the matter is that the Defendant designed a trailer with trailing arms which forms part of the suspension, a mere 97 mm from the ground. The Defendant's representatives knew that this trailer was going to be used for the transport of agricultural equipment in the transport and logistics business carried out by the Plaintiff. It is to my mind important to have regard to the fact that 97mm is approximately the width of a grown man's hand. The net result of this design was that the trailer's suspension snagged on the ground when the trailer was reversed or towed over speed bumps, gate rails, rail crossings and other protrusions in the road. The Defendant did not lead evidence to establish or even try to suggest that it was normal or acceptable in the industry for the suspension of truck-trailers to snag on the ground. The suggestion by the Defendant's witness Nieuwoudt, that the trailer would not snag if it is towed on "*normal road*" does not take the Defendant's case any further. The snagging problems that the Plaintiff experienced with the trailer are in themselves sufficient proof that the 97mm of clearance is neither suitable or acceptable for a trailer being used on South African roads. Trailers are not loaded on freeways and normal roads. They enter loading yards, harbours, railing yards, etc., as conceded by the Defendant's expert, Mr Nieuwoudt.

[49] The question is whether or not the trailer thus designed and manufactured with the trailing arm sitting at 97 mm and its consequences as described in paragraph [48], supra, amounts to a "latent defect" as described by the Court in **Mkhize v Lourens,** supra.

[50] The snagging of the trailer as described above, viewed objectively, clearly had the effect that the trailer thus designed, manufactured and sold, substantially impaired the trailer's utility and effectiveness for the purpose for which it was sold and commonly used. It clearly is a defect and the defect existed at the time of sale. Reichmans Capital and the Plaintiff who received the trailer on their behalf were, subjectively speaking, not aware of the defect. The Plaintiff also handed the trailer

back to the Defendant. This must also be viewed in the context of this Court's finding that Reichmans Capital was the purchaser and not the plaintiff, which has the nett result that the Defendant's standard terms and conditions are not applicable to the sale agreement with Reichmans Capital. As indicated above, Defendant did not plead that it is applicable to Reichmans Capital, nor did it plead it in the alternative. The standard terms and conditions therefore do not advance the Defendant's case.

[51] The pertinent question is however whether or not this defect can be described as a "latent defect", i.e. a defect which was not visible or discoverable upon inspection. The diagrams in the report of Mr Oelofse referred to in paragraph [33], supra, clearly depicts that the lowest point of the suspension is almost on the ground. I therefore find that when the Plaintiff took possession of the trailer on behalf of Reichmans Capital, a mere glace at the trailer's suspension would have revealed this visible or "patent defect" as opposed to a "latent defect". In other words, the defect was visible and discoverable upon inspection. It must be remembered that Mr Webb, the managing director of the Plaintiff is not a novice in the transport business. When he testified, he had been in that position for 15 years.

[52] This finding that the said defect does not amount to a latent defect, has the nett result that the Plaintiff cannot succeed with its claim based on the *actio redhibitoria.* That leaves the question whether or not the Plaintiff succeeded in proving its claim based on breach of contract.

[53] A lot of evidence and time was spent during the trial on whether or not the Defendant is to blame and thus liable to Plaintiff because when the trailer was coupled to Plaintiff's truck-tractors, the 18,5 metres combination length was exceeded and the trailer's deck ran at an angle upwards from the back. As indicated in paragraph [28], supra, the Defendant designed the trailer to be drawn by a Volvo FH 480 6X4 truck-tractor. The sketch indicating that the trailer coupled to such a truck tractor was part of the quotation which was accepted by the Plaintiff. When coupled to such a truck-tractor, the combination length is within the 18.5 meter limit and the deck ran level. The Plaintiff accepted that quotation which was linked to that sketch. Whether the

specifics of different truck-tractors were discussed or not, matters not. It was the Plaintiff who chose to draw the trailer with its Mercedes Benz truck-tractor.

[54] Based on the totality of the evidence presented before me, and specifically the expert evidence, I find that the reason why the trailer's deck ran upwards at an angle and why the combination length of 18,5 metres was exceeded was exactly because of the fact that the Mercedes Benz truck-tractor of the Plaintiff had different dimensions and different fifth wheel position to a Volvo FH480 6x4 truck-tractor. The Plaintiff did not succeed to prove on a balance of probabilities that the Defendant's design or construction with regards to these two aspects amount to latent defects or breach of contract.

[55] That leaves the question whether or not the design and construction of the trailer with the trailing arms sitting at 97mm and the consequential snagging of the trailer referred to above amount to breach of contract despite the fact that it does not amount to a latent defect. In my judgment it certainly does amount to breach of contract for the following reasons:

55.1 The continual snagging of the trailer when reversed or towed over speed bumps, gate rails, rail crossings and the like amounts to a trailer that was designed and manufactured which was not fit for the purpose for which it was sold;

55.2 the nature of this breach is material and goes to the root of the sale agreement;

55.3 the Defendant were afforded numerous opportunities between June and August 2018 to rectify this defect but it failed to do so;

55.4 the trailer was returned to Defendant on 21 August 2018 and the Plaintiff cancelled the sale agreement in May 2019 after taking session of Reichmans Capital's rights;

55.5 At no stage prior to cancellation of the agreement did the Defendant purge its default or effect the necessary repairs to the trailer so as to deliver to Plaintiff a trailer that was free of defects and fit for the purposes for which it was designed, manufactured and sold.

55.6 The Defendant's conduct was a clear and unequivocal indication not to be bound by the terms of the sale agreement and amounted to repudiation which entitled Plaintiff to cancellation.

COSTS RE: APPLICATION FOR ABSOLUTION:

[56] As indicated above, the Defendant brought an unsuccessful application for absolution from the instance after the Plaintiff closed its case. I ordered that those costs will stand over for determination at the end of the trial. In my judgment it should have been clear to the Defendant that at the conclusion of the Plaintiff's case that the Defendant would need to adduce evidence to answer the Plaintiff's case and that the application for absolution ought never to have been brought. There is thus no reason why the order as to costs pertaining to the application for absolution should not follow the result.

ORDER:

[57] In the premises I make the following order:

"1 The lawful cancellation of the of the sale agreement is confirmed

2. The Defendant is ordered to pay the Plaintiff the amount of **R564 300.00.**

3. The Defendant is ordered to pay the Plaintiff interest *a tempore morae* on the aforesaid amount.

4. The Defendant is ordered to pay the Plaintiff's costs of suit, which costs will include the costs pertaining to the application for absolution from the instance which was brought at the conclusion of the Plaintiff's case."

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L. LE R. POHL AJ

On behalf of the Plaintiff: Adv. S. Hoar
Instructed by: Lovius Block Attorneys
Bloemfontein

On behalf of the Defendant: Adv. W. J. Groenewald
Instructed by: Symington & De Kok Attorneys
Bloemfontein