



**IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE DIVISION, MAKHANDA**

CASE NO. CA 105/2022

In the matter between:

TRACTOR WORLD

Appellant

and

MZIMKHULU GEORGE MZWALI

Respondent

JUDGMENT

Rugunanan J

- [1] In proceedings before the East London Magistrate's Court from which this appeal emanates, the appellant and the respondent were respectively the defendant and the plaintiff and will hereafter for convenience be referred to as such.

- [2] The plaintiff instituted action against the defendant claiming repayment of the amount of R27 025. The subject matter of the claim concerned the sale of a mechanical ‘JBH 2 row maize planter’ (the planter), which the plaintiff purchased from the defendant during March 2019.
- [3] The appeal lies against the magistrate’s order in which he granted the plaintiff summary judgment for the aforesaid amount together with interest and costs.
- [4] The plaintiff has elected to abide the decision of this Court.
- [5] Central to the plaintiff’s claim is that the planter sold by the defendant was latently defective.
- [6] In addition to alleging that the defendant breached the agreement for which he seeks cancellation, the plaintiff further alleges in the particulars of claim that:
- ‘8.1.1 The [planter] was defective in that it did not dispense maize seeds to the ground’
- and
- ‘9. ... the [planter] could not be used for planting maize.’
- [7] The defendant’s complaint is that the plaintiff did not plead the actual latent defect/s but merely their consequence or effect. From what follows in this judgment, the defendant’s own version reveals knowledge of the defects as will be evident from an analysis of its plea and its opposing affidavit. In my view this detracts from the argument

that the defendant has put up a case for a *bona fide* defence to have resisted summary judgment.

[8] Under the present formulation of the amended rule 14 of the rules of practice in the Magistrates' Courts, summary judgment proceedings are competent once a defendant has delivered a plea. Although the amended rule (as with the rule 32 of the Uniform Rules applicable in the High Courts) has raised the bar and onus for securing summary judgment¹, a defendant who opposes such an application must still show that it has a *bona fide* defence to the action and must disclose fully the nature and grounds of the defence and the material facts relied upon for such defence.²

[9] In the judgment of Binns-Ward J in *Tumileng Trading CC v National Security and Fire (Pty) Ltd*³ the position is put out as follows:

‘[T]he test for determining whether summary judgment should be given remains unaffected by the amendments ... A defendant is able to defeat an application for summary judgment by showing that it has a bona fide defence. It does that by doing what the subrule enjoins: disclosing “fully the nature and grounds of the defence and the material facts relied upon therefor”. What that entails in practice was set out in Colman J’s classical formulation in *Breitenbach v Fiat SA (Edms) Bpk* 1976 (2) SA 226 (T) at 228B-H, which has been consistently endorsed by the late Appellate Division and the Supreme Court of Appeal.’

[10] In the citation of the *Breitenbach* case referred to in *Tumileng supra*, the word ‘fully’ was not accorded a literal meaning and was held to convey no more than that there be material facts sufficiently full to persuade the

¹ *Standard Bank of SA Ltd v Rahme and Another* [2019] ZAGPJHC 287 para 8.

² *Standard Bank of SA Ltd and Another v Five Strand Media (Pty) Ltd and Others* [2020] ZAECPEHC 33 para 12.

³ [2020] 52 para 12.

court that what the defendant has alleged, if it is proved at trial, will constitute a defence to the plaintiff's claim.

- [11] I am unreservedly in agreement with what has been elucidated in the abovementioned cases and would conclude by parity of reasoning that precisely the same considerations apply as regards the current formulation of rule 14(3)(b) applicable in the magistrates' courts.
- [12] Having said that, the essential issue to be determined in this matter is whether the defendant has shown that it has a *bona fide* defence.
- [13] Unpersuaded that the defendant proffered sufficient particularity to demonstrate a *bona fide* defence, the magistrate granted summary judgment. In addition, he found (albeit on insufficient detail in the papers) that the plaintiff cancelled the agreement, and that the defendant's retention of the purchase price and the planter implied that it accepted return thereof. In my view, these considerations assume less significance as opposed to the essential issue for determination.
- [14] In its plea to the particulars of claim the defendant's version is set out as follows:

‘Ad paragraphs 8, 9, 10 and 11 thereof:

- 7.1 Save to admit that the plaintiff returned the planter to Tractor World, the remainder of the allegations contained in these paragraphs are denied and the plaintiff is put to the proof thereof.

...

7.3 During March or April 2019, the defendant returned the planter to Tractor World in East London. Upon returning the planter, the plaintiff informed Smith verbally of the following:

7.3.1 That prior to returning the planter to Tractor World, the plaintiff had taken the planter to another mechanic to modify the planter and such modifications were done on the dispensing shoot.

7.3.2 The problem the plaintiff was experiencing with the planter was that there was a build-up of the seed in the dispensing shoot. In an attempt to resolve this problem, the plaintiff's mechanic welded the plate inside of the dispensing shoot to change the angle of the dispensing shoot to prevent the build-up of the seed in the dispensing shoot. However, even after these modifications have been done on the dispensing shoot, they failed to resolve the issues of the seed build-up in the dispensing shoot.

7.4 The plaintiff showed Smith the modifications which had been done on the planter's dispensing shoot. Smith informed the plaintiff that as a result of the modifications which had been effected on the planter, Tractor World would not [be] able to return the planter to the supplier, but would instead attempt to fix the issues that were plaguing the planter.

7.5 After the planter was returned to Tractor World, Smith took the planter apart to repair it. Smith went systematically through the planter process, and, among other things:

7.5.1 he found damage to the split bearing and replaced same;

7.5.2 he found that the drive wheel to the driver of the planter boxes was slack (the chain was slack) and he adjusted same;

7.5.3 he refitted the planter plates;

7.5.4 he adjusted the clearances between the planter box and the seed plate face;

7.5.5 he refitted the discharged pipes.

...

7.7 After Smith had finished with the aforementioned repairs, he called the plaintiff and requested him to bring maize in order to test the planter. The plaintiff agreed to bring the maize, however he never brought the maize to test the planter.'

[15] In the opposing affidavit the deponent on behalf of the defendant makes the following assertions:

'18.1 The defendant has denied any defect on the planter.

18.2 The alleged defect relied upon by the plaintiff in his particulars of claim is that the planter did not dispense maize seeds to the ground. This alleged defect is located on the dispensing shoot of the planter.

18.3 The repairs effected by the defendant on the planter were not done on the dispensing shoot, the defendant did not interfere with the dispensing shoot.

18.4 The defendant did not conduct any modifications on the planter. It was the plaintiff who modified the planter.'

[16] Arising from the version put up by the defendant are the following noteworthy observations:

[17] The defendant has identified the latent defect. It was,

'on the dispensing shoot of the planter';

and it caused,

‘a build-up of seed in the dispensing shoot’.

[18] While the defendant acknowledges that the plaintiff’s mechanic had effected a modification the defendant, on its own version, pleads that:

‘[It] attempt[ed] to fix the issues that were plaguing the planter’.

[19] In doing so, repairs were effected to the components listed in paragraphs 7.5.1 to 7.5.5 of the plea.

[20] Thereafter the defendant requested the plaintiff to bring maize seed so that the planter could be tested.

[21] The defendant’s version, considered as a whole⁴, plainly indicates that it knew what issues were troubling the operation of the planter (*inter alia* the build-up of seed); it identified them in its pleadings and, by its own admission, had repaired them.

[22] In argument before us defendant’s counsel was hard-pressed to concede that there is a manifest inconsistency between, on the one hand paragraph 7.1 of the plea in which the latent defects are denied, and on the other hand the identification of issues that troubled the operation of the planter.

[23] He contended nonetheless that these were issues disparate from the more significant being the warranty on the planter having been voided by the modification effected by the plaintiff’s mechanic. Hence, if viewed

⁴ *Tumileng Trading CC v National Security and Fire (Pty) Ltd; E and D Security Systems CC v National Security and Fire (Pty) Ltd* [2020] ZAWCHC 28 para 4 including the footnote thereto wherein reference is made to *Maharaj v Barclays National Bank* 1976 (1) SA 418 (A) at 423.

from that perspective – which he contended the magistrate ought to have done – the inconsistency did not render the plea devoid of a *bona fide* defence.

[24] I have difficulty with this argument.

[25] What follows are my reasons.

[26] First, all that the defendant has pleaded is that: ‘as a result of the modifications which had been effected on the planter, Tractor World would not [be] able to return the planter to the supplier’. It has not been pleaded nor is mention made in the defendant’s opposing affidavit whether special conditions pertaining to the existence and operation of the warranty were present at the conclusion of the sale agreement – in particular, it cannot be determined if what is asserted as a defence is in the guise of an express or implied warranty with conditions exercised either at the instance of the seller or at the instance of the supplier/manufacturer. Moreover, the operation of the warranty as between the defendant and the supplier, or as between the plaintiff and the defendant, or as between the plaintiff and the supplier, is the other unknown factor. The nature of the warranty and the identity of the party at whose specific instance the warranty falls to be invoked is not evidenced in the pleading.

[27] To sum up, I consider that the nature and grounds of the defence and the material facts relied upon therefor have not been pleaded. I am therefore loath to make the assumption that the warranty would be enforceable at the instance of the defendant because it does not find support either in the plea or in the opposing affidavit.

- [28] Second, a seller has a residual obligation imposed by operation of the law not to sell goods that are defective.⁵ Paragraphs 7.4 and 7.5 of the defendant's plea indicates that the defendant recognised issues that affected the operation of the planter and despite the alleged breach by the plaintiff, the defendant proceeded to take the planter apart and repair it. On these facts and for reasons aforementioned, the warranty defence comes to naught.
- [29] Third, the argument for the defendant does not accord with the construction of the defendant's pleaded version. The reason therefor is that the defendant's pleadings must be interpreted on the basis of how they are formulated. On that approach it is clear that the defendant identified issues and did repair-work. Its knowledge of the seed build-up and the specific components of the planter to which repairs were effected is – on a proper construction of its plea – inconsistent with the denial of defects in paragraph 7.1 of the plea and in paragraph 18.1 of the opposing affidavit.
- [30] It was submitted for the defendant that the denial must be understood in the context of plaintiff's failure to have alleged the existence of latent defect/s⁶. It does not behove the defendant to belatedly criticise the plaintiff for not alleging the existence of the defect/s⁷ – when self-evidently the particulars of claim comprehend that the planter was substantially impaired for the purpose for which it was sold or for which it is commonly used, and that the defendant took it upon itself to identify glitches and fix them.

⁵ See *Barnard and Another v De Klerk* [2020] ZAECPHC 38 para 10 and the authorities cited in the footnotes thereto.

⁶ *Mkhize v Lourens and Another* 2003 (3) SA 292 (TPD) at 294B-E.

⁷ *Mkhize v Lourens and Another* 2003 (3) SA 292 (TPD) at 294B-E.

- [31] The defendant's denial is disingenuous and conflicts with its pleaded version that repairs for issues that plagued the planter were effected. The build-up of seed in the dispensing shoot was one of the issues identified by the defendant. From this perspective of the defendant's pleadings the rationale for requesting the plaintiff to bring seed (despite the protestation that no repair-work was done to the dispensing shoot), quite plainly points towards testing the planter to ascertain if the issue persisted after repairs were effected.
- [32] In the circumstances, and contrary to the submission by counsel for the defendant, I am satisfied that the plaintiff's founding affidavit (terse as it is) unmistakably and correctly asserts that the defendant's plea does not dispute that the planter was latently defective.
- [33] For the above reasons I am unpersuaded:
- 32.1 that the nature and grounds of the warranty and the material facts relied upon therefor have been pleaded, and
- 32.2 that the defendant's denial of defects in contradiction of its pleaded version that the planter was repaired, has merit.
- [34] Accordingly, what has been alleged by the defendant, if proven at trial, will not constitute a *bona fide* defence.
- [35] In the result the appeal is dismissed.

M. S. RUGUNANAN

JUDGE OF THE HIGH COURT

BESHE J: I agree.

N. G. BESHE

JUDGE OF THE HIGH COURT

Appearances:

For the Appellant:

C. D. Kotze
Instructed by Abdo & Abdo
c/o Netteltons Attorneys
Makhanda
Tel: 046-622 7149
(Ref: I. Pienaar)

For the Respondent:

No Appearance
Khaya Dywanisi Attorneys Inc.
King William's Town
Tel: 043- 6109 / 084 219 7049
(Ref: M052)

Date heard:

03 March 2023

Date delivered:

14 March 2023