



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

Case No. CA 136/2022

Gqeberha District Court Case No. 14415/2017

In the matter between:

**ZEDA CAR LEASING (PTY) LTD
t/a AVIS FLEET SERVICES**

Appellant

and

COENIE FOURIE N.O.

Respondents

JOHAN ABRAHAM VAN HUYSETEEN N.O.

KYLA JEAN FOURIE N.O.

(In their capacities as Trustees of Algoa Bay Auto)

JUDGMENT

LAING J

[1] This is an appeal against a decision of the Gqeberha Magistrates' Court. The court *a quo* granted judgment against the appellant in the amount of R 42,634 for damages arising from the sale of a defective motor vehicle.

[2] The appellant trades as Avis Fleet Services ('Avis'). The respondents are trustees for Algoa Bay Auto, which acquires motor vehicles for re-sale to the public. An outline of the parties' respective cases follows.

Algoa Bay Auto's case

[3] The respondents pleaded that they purchased a Nissan NP 200 motor vehicle ('the vehicle') from Avis on 13 April 2017 at Gqeberha. This was done in response to an online advertisement. The purchase price was R 112,300.

[4] They alleged that they relied on the following representations: the vehicle was a 2016 model and still covered by a full warranty; the last service had been carried out after 74,625 kilometres; the odometer reading at the time of purchase was 79,488 kilometres; and repairs limited to the value of R 13,190 would be needed. They later sold the vehicle to a third party.

[5] Subsequently, pleaded the respondents, the vehicle suffered a major breakdown because of a material defect in the radiator. A complete engine replacement was necessary. The respondents alleged that Avis had been aware of the defect at the time of the purchase, as apparent from a service invoice, but had failed to repair the radiator, alternatively had failed to inform the respondents.

[6] The respondents claimed damages in the amount of R 42,634. This comprised the sum of the actual costs of repair and a further amount refunded to the third party because of the non-disclosed defect.

Avis's case

[7] Avis admitted that the respondents had purchased the vehicle. It went on to plead that Algoa Bay Auto was a registered user of an online auction facility called TradersOnline. By placing an online bid for the vehicle, the respondents had bound themselves to certain terms and conditions. These included the following: the purchase of a motor vehicle was done entirely at the respondents' risk; ownership and risk passed from Avis to the respondents once full payment had been made; a motor vehicle was sold *voetstoots* and Avis accepted no liability for any patent or latent defects.

[8] The respondents, alleged Avis, were aware at the time of the purchase that the vehicle needed repairs to the value of R 13,190. They were also aware that provision had to be made for unforeseen repairs in the amount of R 6,000. Avis pleaded that the respondents had purchased the vehicle *voetstoots* and had acknowledged that they were satisfied with the condition of the vehicle.

[9] In relation to the service invoice, Avis pleaded that it had not been in possession of the vehicle at the time. It had been in the possession of ADT Security ('ADT'), which had taken the vehicle to Nissan Eastern Cape ('Nissan') for its 75,000-kilometre service. Avis, consequently, had had no knowledge of the defect and had subsequently deemed it to be roadworthy. It denied that it was indebted to the respondents.

In the court *a quo*

[10] The matter went to trial. The first respondent, Mr Coenie Fourie, testified in his capacity as a trustee for Algoa Bay Auto. The respondents also presented the evidence of the service manager at Nissan, Mr George Skorbinski. At the conclusion of the respondents' case, Avis applied unsuccessfully for absolution from the instance.

[11] Avis proceeded to lead the evidence of a number of witnesses: a supervisor at the company, Mr Gideon Labuschagne, who was also responsible for the inspection of motor vehicles that Avis leased out; a roadworthiness examiner at Dekra Auto Motors ('Dekra'), Mr Abrie Brookman; a creditors clerk at Avis's offices, Ms Karen Putter; a general manager at one of Avis's divisions, Mr Wayne Bartley; a costing manager in Avis's Finance Department, Ms Gerda Smith; and a manager at Avis's Call Centre, Mr Imtiaz Shiralie.

[12] The magistrate found, at the conclusion of the trial, that the defect with the radiator had been identified during the 75,000-kilometre service. This had been communicated to Avis on 13 February 2017. The defect had been present at the time of the sale of the vehicle to the respondents, who would not have gone ahead with the purchase had they had known about it. Avis had been under a duty to disclose the defect to the respondents. It never did so. The magistrate found, consequently, that Avis had acted fraudulently by deliberately concealing it.

[13] In the circumstances, the court *a quo* was satisfied that the respondents had proved their case. It awarded damages, as claimed.

Basis of appeal

[14] Avis has appealed against the whole of the judgment and order of the court *a quo*. It has listed numerous grounds as the basis for its appeal, the most pertinent of which being set out below.

[15] It is contended that the court erred in fact and in law by failing to attach weight to the absence of evidence that Avis was contacted telephonically on 9 February 2017 about the defect with the radiator, that the service invoice had been addressed and submitted to ADT, and that Mr Skorbinsky had not been directly involved in the service itself.

[16] Avis contends, too, that the court erred by holding that a warning on the service invoice that the vehicle should not be driven was intended for Avis rather than ADT, and by failing to attach weight to the evidence that Avis had sent the vehicle to an independent company, Dekra, which had found no defect.

[17] The court also erred, contends Avis, by failing to hold that the office responsible for authorising the sale of the vehicle was separate to that which held the information about the defect with the radiator, that the vehicle was driven for a further 6,000 kilometres after 9 February 2017 without damage to the engine, and that it was possible that ADT had arranged for the repair of the radiator but not with the assistance of Nissan.

[18] Avis goes on to contend that the court erred by failing to attach weight to the evidence that it was unreasonable to have expected Avis to have become aware of the defect because of an email sent by Nissan to an administrative clerk at Avis's offices when the established procedure was for repair authorisations to have been communicated to technical staff in Avis's Maintenance Department. It also erred by failing to attach weight to the absence of evidence that any of Avis's employees who saw the service invoice breached a duty to report the defect to Mr Labuschagne or any other senior manager.

[19] A further ground of the appeal is that the court *a quo* incorrectly conflated the tests for negligence and *dolus* and failed to find that Avis was unaware of the defect at the time of the sale. The court, argues Avis, should have held, too, that Avis did not deliberately conceal the defect and that any misrepresentation about the condition of the radiator was innocent.

[20] Finally, Avis asserts that the court erred in holding that the respondents were entitled to the payment of any damages, and in not holding that Avis was entitled to its costs, including those of counsel, at twice the tariff for the Magistrates' Court.

[21] The respondents have opposed the appeal. There is no cross-appeal.

Issues to be decided

[22] Counsel for the parties were *ad idem* that the following issues require determination: (a) whether the vehicle was defective at the time of sale; and (b) whether Avis deliberately concealed or misrepresented the nature of the defect to defraud the respondents. To these, Avis has added a further issue, viz. whether it is entitled to costs at a higher tariff if its appeal succeeds.

[23] The determination of (a), above, amounts to an investigation into whether the court *a quo* arrived at a correct finding on the facts. If the finding ought to have been that the vehicle was not defective, then *caedit questio*, that is the end of the matter. Conversely, if the finding was correct, then the determination of (b) entails an enquiry into whether the court *a quo* should have held that there was no deliberate concealment or misrepresentation with the intention to defraud. This amounts chiefly to a legal enquiry.

[24] For immediate purposes, it may be helpful to commence with the legal enquiry. Before doing so, however, the relevant principles must be identified.

Legal framework

[25] A contract of sale lies at the heart of the matter. Broadly speaking, a seller has a common law obligation to, *inter alia*, warrant that the subject of the sale is fit for use and to warrant that there are no latent defects.¹ A redhibitory action for rescission of the contract and the *actio quanti minoris* for a reduction of the price are available to the buyer when the seller fails to comply with his or her obligations.² The erstwhile Appellate

¹ AJ Kerr, 'Sale', in *LAWSA* (vol 36, 3ed, updated to 31 July 2021), at paragraph 267.

² RH Zulman and H Dicks, *Norman's Law of Purchase and Sale in South Africa* (LexisNexis, 6ed, 2017), at 193. The remedies are loosely referred to as the Aedilician actions.

Division confirmed, in *Phame (Pty) Ltd v Paizes*,³ that the warranty against latent defects imposes liability on the seller in terms of the Aedilitian actions where the subject of the sale was defective, irrespective of whether or not the seller knew of such defect at the time.⁴

[26] A seller may, nonetheless, contract out of a warranty against latent defects, as confirmed by the Appellate Division in *Van der Merwe v Meades*,⁵ relying on Roman-Dutch authorities.⁶ The contractual exclusion is usually referred to as a *voetstoots* clause. Importantly, it does not protect the seller against fraud.⁷ To prevent the seller from relying on a *voetstoots* clause, the buyer must prove that the seller was aware of the defect at the time and deliberately concealed it from the buyer.⁸

[27] The above principles comprise a basic framework for the legal enquiry that follows in the paragraphs below.

Application of principles to the facts

[28] The material facts of the matter, as evident from the record, are set out below. The relevant principles will then be applied thereto.

Material facts

³ 1973 (3) SA 397 (A).

⁴ At 416H.

⁵ 1991 (2) SA 1 (A).

⁶ At 4F-G.

⁷ *Bosman Bros v Van Niekerk* 1928 CPD 67.

⁸ AJ Kerr, see n1 above, at paragraph 297.

[29] It was common cause that Avis relied on a *voetstoots* clause to escape liability for any latent defect that there may have been in the vehicle. The clause in question stated:

'5.2 Save for the warranties, undertakings and representations made in this agreement the vehicle/s have been inspected by the buyer and are sold voetstoots and subject to any manufacturers warranties which may still be applicable to the vehicle and the seller accepts no liability for any patent or latent defects in the vehicle.'

[30] The respondents, in turn, based their case to a large extent on the contents of a tax invoice sent by Nissan to Avis's offices in Isando. At the foot of the first page of the document, under the heading, 'Invoice Report', appeared the following:

'Next service 90,000 km

Report

*** Radiator to be replaced ***'

Towards the top of the second page of the same document, directly underneath the addresses for Avis and ADT, respectively, appeared the following:

'Water level⁹ very low- suggest vehicle not be driven- can overheat'

[31] It was not disputed that Avis had leased the vehicle to ADT, which had taken it to Nissan for a 75,000-kilometre service. The respondents' witness, Mr Skorbinski, testified that Nissan detected a leak in the radiator, which was communicated to the relevant

⁹ The original word used was 'lever', but Mr Skorbinski testified that this was a typographical error.

employee at ADT.¹⁰ The issue was recorded on the invoice. When asked why, Mr Skorbinski responded that:

'Because we have made the customer aware at that stage and they requested that they will take the vehicle away and repair it on their own. So, I can give you a bit of background on ADT, is that when their vehicles had damage, we barely fix damage vehicles. They would take them away and fix damaged vehicles on their own.'¹¹

[32] Mr Skorbinski went on to state:

'...What I was trying to imply is that 99% of... when their [ADT's] vehicles are accident related or damaged, they do not repair it with Nissan...'¹²

[33] The following exchange illustrates the nature of the relationship between Nissan and ADT, and Nissan and Avis, respectively:

'MR LAMBRECHTS:	Sir, you indicated that you would have informed the ADT person of the issue of the radiator and that it should not be driven. Of course, this warning also forms part of the report, part of the invoice. So, how would Avis be aware of this radiator leak?
MR SKORBINSKI:	Well, like I said, if we do find anything untoward on a service which requires additional work, we put it on the invoice, on the report section, and I am not sure from Avis's side who checks the invoices or... I am not sure.

¹⁰ The record indicates that Mr Skorbinski referred to an 'ADT controller'. His or her name, title and responsibilities are not apparent.

¹¹ Sic. At vol 9 (supplementary record), p 768, lines 13-18.

¹² Op cit, p 769, line 25, to p 770, lines 1-2.

MR LAMBRECHTS: Alright, then as you said, invoices would have been emailed to Avis for payment?

MR SKORBINSKI: *Ja*, that is it.

MR LAMBRECHTS: That includes the report that the radiator needs to be replaced?

MR SKORBINSKI: That is it.¹³

[34] It is clear from the record that Nissan sent the invoice to Avis more for payment than for reporting the leak in the radiator. That issue was chiefly for ADT's attention. It is also evident that Nissan's only communication of the issue to Avis was by way of the invoice. This appears from the questions put to Mr Skorbinski by the court *a quo*:

'COURT: Any repairs made to the radiator from the date it was communicated to ADT?

MR SKORBINSKI: No, we did not carry out any repairs on the radiator.

COURT: Okay. Was there any way that would make Avis to be aware of the damage that needed to be attended to for the motor vehicle?

MR SKORBINSKI: Only on the invoice.'¹⁴

[35] The route followed by the invoice from the time that it was sent to Avis until the time of payment was also not in dispute. Ms Putter testified that, on 13 February 2017, she received an email from Nissan to which copies of invoices were attached, including the invoice in question. She was responsible for the management of Nissan's account. She sent the invoices to Avis's Scanning Department, where they were loaded onto the company's document management system, using Laserfiche software. Ms Putter was one of 12 creditors clerks who received between 40,000 and 50,000 invoices per month. This made the digital storage of information necessary, rather than rely on printed copies. She stated that she was required to reconcile the invoices received with the statements that would be prepared for various creditors, including Nissan. The actual payment of

¹³ Op cit, p 774, lines 14-25, to p 775, lines 1-3.

¹⁴ At vol 4, p 318, lines 9-16.

invoices was done by Avis's Finance Department, where costing clerks were responsible for verifying the actual amounts claimed for any motor vehicle, using the summarised information that was stored on the main server, running AS 400 software.

[36] Ms Putter testified, importantly, that the first time that she became aware of Nissan's comments in relation to the service carried out on the vehicle was when she was contacted, on 12 June 2017, by Avis's supervisor in Gqeberha, Mr Labuschagne. The record plainly shows that Ms Putter had nothing to do with any repairs that may have been required. She explained this while under cross-examination:

MR LAMBRECHTS:	Now who would communicate at Avis if there is further work that is required on a vehicle?
MS PUTTER:	A dealer will go back to our Authorisations [Department]. And for each and every service, for each and every mishap on a vehicle or whatever the fault might be, they know that they always have to phone Authorisations... and we will allocate authorisation for that... order number. And based on the order number they will repair the vehicles.
MR LAMBRECHTS:	So, Avis would be aware that further work is needed and they would then give the green light for the further work. Am I correct I saying that?
MS PUTTER:	I cannot confirm that. I am not a technical person and neither do I work in Authorisations, so I do not know. ¹⁵

[37] According to Ms Putter's evidence, it was incumbent on Nissan to have contacted Avis's Authorisations Department for purposes of reporting an issue. Ms Putter was simply responsible for managing a limited aspect of the accounting involved for the vast number of monthly invoices that Avis received from creditors.

¹⁵ At vol 6, p 559, lines 17-25, to p 560, lines 1-5.

[38] The above arrangement was confirmed by Mr Bartley, who testified that the purpose for which a dealership such as Nissan sent an invoice to Avis was purely to receive payment. There were no technical staff involved in the payment process. He also stated that when Nissan contacted Avis for authorisation to carry out a service, the relevant staff in the Authorisations Department would record the request on Avis's AS 400 system. The staff would verify that the request was in accordance with the manufacturer's requirements before issuing an order for the service to proceed, which would also be captured on the system. Only a summary of the service would be recorded, not the actual details thereof, for which the invoice itself would be required. The invoice was not loaded onto the system.

[39] Mr Bartley pointed out, too, that not all staff had access to the AS 400 system. This was for security reasons, to protect the information held by Avis. Similarly, not all staff had access to the Laserfiche document management system because of the considerable electronic bandwidth that would be needed to accommodate the many thousands of monthly invoices that Avis received. The company had, at the time that the dispute arose, more than 20,000 motor vehicles under its ownership and a further 100,000 that it managed. Mr Bartley was adamant that an employee responsible for the sale of an Avis motor vehicle would only be able to obtain a summary of its service history from the AS 400 system, he or she would not have direct access to any invoice issued in relation thereto.

[40] The following exchange between the court *a quo* and Mr Bartley is pertinent:

'COURT:	Is there any way that those who have access to the information would not have known the defects on the motor vehicle? That were pointed out by Nissan Eastern Cape...?
MR BARTLEY:	<i>Ja</i> , there is no way that the used car department would know about information recorded on an invoice and not communicated to anybody... I do not think the maintenance department even knew about that. And just on that, if... somebody knew about that defect, I mean that defect... is really not an expensive repair, it is

a few hundred rands, it is not... something that you want to hide from anybody. If you knew about it, you would get it repaired or you would make a statement on it. It is not an expensive repair, it is like... leaving the oil plug of the... engine, it is not an expensive repair, but it can have catastrophic consequences...'¹⁶

[41] It is very apparent that if Nissan had wished to bring the defective radiator to the proper attention of Avis, then it would not have done so by way of an invoice sent to a creditors clerk. The evidence of Mr Bartley was that the issue, had it been seen in time, could have been dealt with quickly and at very little expense. There would have been no reason to have concealed it.

[42] The costing manager, Ms Smith, corroborated the testimonies of Ms Putter and Mr Bartley regarding the procedure that was followed. A capturing team was responsible for capturing the details contained in the invoices received. A costing team then compared the invoice details with the order details captured by an authorisation team in relation to the repairs or other work so authorised. If the invoice details tallied with the order details, then a finance team would attend to payment.

[43] The actual repairs to a motor vehicle, requested by a dealership such as Nissan, were authorised by the relevant employee in Avis's Authorisations Department. The manager involved at the time, Mr Shiralie, indicated that Avis's records showed, in relation to the vehicle, that Nissan had only requested authorisation to carry out a 75,000-kilometre service and to replace a light bulb. Significantly, requests and authorisations for repairs were all conducted telephonically. Mr Shiralie made this clear during cross-examination:

'MR LAMBRECHTS:

...So then, Avis was then aware of the radiator when the job card was done and then when the invoice was presented?

¹⁶ At vol 7, p 636, lines 12-25, to p 637, lines 1-4.

MR SHIRALIE:	No.
MR LAMBRECHTS:	Why do you say that?
MR SHIRALIE:	This [was] only brought to my attention on the 15 th of June [2017].
MR LAMBRECHTS:	All right. Remember my question, sir?
MR SHIRALIE:	Yes.
MR LAMBRECHTS:	I said that Avis was aware. So, I said Avis was aware of the job card...
MR SHIRALIE:	No.
MR LAMBRECHTS:	You disagree with that?
MR SHIRALIE:	I mean, sorry, at what period?
MR LAMBRECHTS:	Well, when the job card would be created.
MR SHIRALIE:	That will be on the day of the service, so we were not aware of it.
MR LAMBRECHTS:	If a dealership informs you or they do not ask for authorisation, but they can see that a part might need to be replaced. How would they inform you of, of such a situation?
MR SHIRALIE:	So, they would call in to us and tell us that we [are] either doing a warranty on this vehicle and this is the part that is going to be replaced. So, we would capture it on our system as a history.
MR LAMBRECHTS:	All right. And...
COURT:	Please, just a minute. What was your question?
MR LAMBRECHTS:	Your worship, my question would be, if they were not going to do repairs at that time and they would highlight an issue, how would they inform Avis of, of such an operation?
COURT:	Mm.

MR SHIRALIE:	They will, they will call us and inform us and we will put it on our system as a remark or reminder.
MR LAMBRECHTS:	Or they could make comments on, on the invoices?
MR SHIRALIE:	The invoices...
MR LAMBRECHTS:	Do you agree?
MR SHIRALIE:	We do not see the invoices, so, if they put it on there, we are not going to know about it. ¹⁷

[44] The procedure for carrying out repairs to a motor vehicle entailed direct contact by telephone between the dealership and the relevant Avis employee at the Authorisations Department. It did not involve communication by invoice. Mr Shiralie also confirmed that Avis's AS 400 system only captured the details of what was required to be authorised, it did not capture what was reflected on the dealership's job card. That stayed with the dealership in question.

[45] Avis's supervisor in Gqeberha, Mr Labuschagne, inspected the vehicle on 22 March 2017 after the lease with ADT had expired. He testified that he had checked the radiator and seen that the water level was 'good' and that there had seemed to be nothing wrong. A roadworthiness examiner at Dekra, Mr Brookman, tested the vehicle on 23 March 2017. He stated that he had not noticed any water leaks or cracks in the radiator. Mr Labuschagne loaded the vehicle details onto the online auction facility, TradersOnline, on 11 April 2017, at the instruction of Avis's national terminations manager, Mr Peet Strydom. No history of the vehicle was provided.

[46] The first respondent purchased the vehicle on 12 April 2017. There was no evidence that any employee of Avis was aware, at the time, that the radiator was defective.

¹⁷ Op cit, p 656, line 11, to p 658, line 2.

The legal enquiry in relation to the material facts

[47] For the respondents to have succeeded in their claim, they were required to have proved that Avis not only had knowledge of the defective radiator but that the company also deliberately concealed it. As the Appellate Division, in *Van der Merwe v Meades*,¹⁸ found, the buyer must prove that the seller, firstly, was aware of the defect in the *merx* and, secondly, *dolo malo* concealed its existence from the buyer with the intention of defrauding him or her.¹⁹ This was subsequently discussed in *Simon NO and others v Mitsui and Co Ltd and others*,²⁰ where Wunsch J observed as follows:

‘A person who colludes with the company’s officers fraudulently to obtain credit or a creditor which accepts payment knowing that the money had been procured fraudulently for the very purpose of paying it could knowingly be a party to the carrying on of the business to with intent to defraud... “Knowingly” means having actual knowledge or having knowledge in the form of *dolus eventualis*, which in the present context means that a party will be held to have knowledge if he or she subjectively foresaw the reasonable or real possibility that conduct or a course of conduct would result in a preference or prejudice... and reconciled himself or herself to the fact, that he or she nevertheless pursued the conduct or allowed it to be pursued when he or she could have prevented it. If a person has a suspicion that something unlawful is happening and deliberately shuts his or her eyes to what is going on, he or she is knowing...’²¹

[48] It is not enough for Avis merely to have been aware of the defect. Avis must also have hidden it from the respondents, knowing that they could well have suffered injury or harm, in the broad legal sense, because of such conduct.

¹⁸ See n 5 above.

¹⁹ At 8E-F.

²⁰ 1997 (2) SA 475 (WLD).

²¹ At 526 B-D. See, too, *Frankel Pollak Vinderine Inc v Stanton NO* 2000 (1) SA 425 (WLD), at 439H-J, 440D-I, and 443G-H.

[49] This raises, in turn, the question of what would constitute knowledge on the part of Avis as a juristic person. The subject was considered in *Anderson Shipping (Pty) Ltd v Guardian National Insurance Co Limited*,²² where the Appellate Division dealt with the question of whether the appellant, a private company, had actual or constructive knowledge of the facts of a matter. Nicholas AJA held:

'Being a corporation, Anderson does not have a mind, and hence cannot itself have knowledge. The knowledge of a company can only be the knowledge of the "directors and managers who represent the directing mind and will of the company, and control what it does"...²³ Subordinates, who merely carry out orders from above, do not speak and act as the company and do not represent the "directing mind and will of the company"...²⁴ Their knowledge is not *per se* the knowledge of the company.'²⁵

[50] The law treats the act or state of mind of anyone who represents and controls a company as the act or state of mind of the company itself.²⁶ However, as Wunsch J remarked in *Simon NO and others v Mitsui and Co Ltd and others*, it is a condition of liability for a person with knowledge that he or she was a party to the carrying on of the business. On this basis, a person is not aware of a fact merely because his or her employee or agent has knowledge thereof.²⁷

[51] In the present matter, there is no evidence at all that any of Avis's directors was aware of the defect. There is, moreover, no evidence that any of its employees was aware. This stands to reason. Nissan's reporting of the defect in the radiator of the vehicle was confined to two single-line entries on separate pages of an invoice sent to a creditors clerk at Avis's offices in Isando. Ms Putter's responsibility was to manage Nissan's account and to reconcile the invoice details with the statement issued in due course. She

²² 1987 (3) SA 506 (AD).

²³ The Appellate Division referred to, *inter alia*, the English authority of *HL Bolton (Engineering) Co Ltd v Graham & Sons Ltd* [1957] 1 QB 159, at 172.

²⁴ *Tesco Supermarkets v Nattras* 1972 AC 153 (HL), at 170-1.

²⁵ At 515H – 516A.

²⁶ Joubert (ed), *LAWSA* (vol 4, part 1, first reissue), at paragraph 55, referred to in *Simon NO and others v Mitsui and Co Ltd and others*, n 20 above, at 530A-B.

²⁷ *Op cit*, at 526E-F.

had absolutely nothing to do with any repairs that were necessary. The same could be said of the relevant employees attached to the capturing, costing, and finance teams. The invoice was one of 40,000 to 50,000 invoices that Avis received each month in relation to its fleet of more than 120,000 motor vehicles. This was a tiny needle in a very large haystack. Its location and any access thereto were restricted to the Laserfiche document management system, not the more extensive AS 400 database. Even if an employee involved in the accounting process had become aware of the issue, then the decision in *Trucar Finance & Acceptance Corporation Ltd v Jones' Garage & Service Station* is authority for the principle that such knowledge cannot, by representation, be ascribed to Avis itself.²⁸

[52] Had it indeed been Nissan's intention to bring the issue to the proper attention of Avis, then it would not have relied on an invoice but would rather have contacted the Authorisations Department directly, by telephone. The record indicates that Nissan sent the invoice to Avis for payment, not reporting purposes. Mention of the defect was intended for Nissan's customer, ADT. This was the party that brought the vehicle to Nissan for its 75,000-kilometre service and which continued using it afterwards. Mr Skorbinski's evidence was to the effect that, for '99%' of the time, ADT made its own arrangements for any repair work required, instead of leaving this to Nissan and (by implication) Avis.

[53] Counsel for the respondents criticised Avis's indication that the vehicle had previously been involved in an accident, as apparent from the details listed on the TradersOnline auction facility. The evidence had been that this was done as a matter of course, to protect Avis against possible liability if the opposite was stated but subsequently found to be untrue. Counsel referred to the Supreme Court of Appeal decision in *Odendaal v Ferraris*,²⁹ where Cachalia JA held:

²⁸ 1963 (1) SA 588 (T).

²⁹ 2009 (4) SA 313 (SCA).

'Where a seller recklessly tells a half-truth or knows the facts but does not reveal them because he or she has not bothered to consider their significance, this may also amount to fraud.'³⁰

[54] In that regard, counsel contended that Avis's indication that all its motor vehicles had been involved in accidents was an attempt to escape its duty to inspect each motor vehicle properly before selling it to a buyer. This brought its conduct within the ambit of fraud, as contemplated in *Odendaal*.

[55] Cachalia JA went on to observe, however, that fraud will not lightly be inferred. The allegation had to be clearly pleaded and the facts upon which the inference was sought to be drawn had to be succinctly stated.³¹ The respondents never pleaded this. The argument seems to have emerged much later. In any event, it fails to address the evidence that Avis simply had no knowledge, at the time, of the defective radiator or any other fact that could have converted its description of the vehicle to a half-truth or that ought to have triggered a proper consideration of the significance thereof.

[56] A related argument relied on the decision of in *Knight v Trollip*,³² where Selke J held that a seller may be held liable where he or she 'designedly concealed' the existence of a defect from the purchaser or where he or she 'craftily refrained' from informing the purchaser of its existence.³³ Counsel asserted that the manner in which Avis had implemented its document management system and its AS 400 database was such as to have given rise to the conduct described above. In other words, Avis permitted any reporting of the defect to remain buried within the vast collection of invoices stored on its Laserfiche software. The AS 400 database, as comprehensive as it was, contained only a summary of the details on an invoice and did not allow access by all employees.

[57] The argument is not persuasive. The evidence regarding the substantial volume of monthly invoices received, the sizeable fleet of motor vehicles owned or managed by

³⁰ At paragraph [29].

³¹ Ibid.

³² 1948 (3) SA 1009 (D).

³³ At 1013.

Avis, as well as considerations of available electronic bandwidth and security imperatives, explain the organisational structures and systems that had been established.

[58] In *Knight*, Selke J went on to state as follows:

'In such circumstances, his liability is contingent on his having behaved in a way which amounts to a fraud on the purchaser, and it would thus seem to follow that, in order that the purchaser may make him liable for such defects, the purchaser must show directly or by inference, that the seller actually knew. In general, ignorance due to mere negligence or ineptitude is not, in such a case equivalent to fraud.'³⁴

[59] The fact that the report on the defect in the radiator never came to Avis's attention may give rise to the suggestion of negligence but it fails to cross the threshold of fraud. There was simply no evidence that Avis 'designedly concealed' the defect or 'craftily refrained' from telling the respondents.

[60] Counsel for the respondents also relied on *Connock's (SA) Motor Co Ltd v Sentraal Westelike Ko-operatiewe Maatskappy Bpk*³⁵ and the more recent case of *Minister of Water Affairs and Forestry and others v Durr and others*³⁶ to contend, as far as the argument is understood, that ADT had acted as the agent of Avis when delivering the vehicle to Nissan for its 75,000-kilometre service. Any information about the defect conveyed to ADT could, in turn, be imputed to its principal, Avis.

[61] Aside from the absence of evidence to support any suggestion of a principal-agent relationship, as opposed to one involving a lessor and a lessee, the necessary facts and argument were never pleaded. Nothing turns on the point.

³⁴ Ibid.

³⁵ 1964 (2) SA 47 (T).

³⁶ 2006 (6) SA 587 (SCA).

Relief and order

[62] The court is satisfied that the evidence demonstrates that the respondents failed to prevent Avis from relying on the *voetstoots* clause. There was no proof that Avis was ever aware of the defect in the radiator at the time of the sale of the vehicle and that it concealed its existence from the respondents. The court *a quo* misdirected itself in finding otherwise.

[63] It is unnecessary, for obvious reasons, to determine whether the vehicle was defective at the time of the sale. The respondents failed to prove fraud.

[64] The only remaining issue is that of costs. Counsel for Avis asserted that it was entitled thereto at a higher tariff. The provisions of Magistrates' Court rule 33(8) provide that:

'The court may on request made at or immediately after the giving of judgment in any contested action or application in which—

- (a) is involved any difficult question of law or of fact; or
- (b) ...
- (c) ...
- (d) ...

award costs on any scale higher than that on which the costs of the action would otherwise be taxable: Provided that the court may give direction as to the manner of taxation of such costs as may be necessary.'

[65] This was undoubtedly a matter involving difficult questions of law and fact. The outcome of the matter was, moreover, especially significant for the parties since it would have a bearing on the conditions of sale for motor vehicles advertised by Avis on an online auction facility such as TradersOnline and would affect the extent to which the

respondents would continue to rely on such facility for their purchases. The court is persuaded that the court *a quo* misdirected itself in not applying rule 33(8).

[66] In the circumstances, it is ordered that:

- (a) the appeal succeeds with costs;
- (b) the order of the court *a quo* is set aside and replaced with the following:
 - (i) the plaintiff's claim is dismissed; and
 - (ii) the plaintiff is directed to pay the defendant's taxed party and party costs, including counsel's fees in amounts not higher than twice the amounts set out in the relevant tariff contained in Part IV of Table A to Annexure 2 of the Magistrates' Court rules.

JGA LAING
JUDGE OF THE HIGH COURT

I agree.

M GWALA

JUDGE OF THE HIGH COURT (ACTING)

APPEARANCE

For the appellant: Adv Kroon, instructed by Poswa Inc. Attorneys, Sandton c/o
Wheeldon Rushmere & Cole Inc., Makhandha.

For the respondent: Adv Lambrechts, instructed by Friedman Scheckter Attorneys
c/o Netteltons Attorneys, Makhandha.

Date of hearing: 26 May 2023.

Date delivered: 22 August 2023.