



**HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

CASE NO: A268/2020

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: NO.

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED.

DATE: 18 JULY 2022

SIGNATURE

In the matter between:

EXTREME LIFESTYLE CENTRE (PTY) LTD

Appellant

and

MIVAMI CONSTRUCTION CC

Respondent

Summary: Contract – interpretation – financing of purchase – actual nature of contract – warranty – independent binding agreement

ORDER

1. The appeal succeeds in part and the order in the court a quo is replaced with the following:

“1. *It is declared that whatever agreement the parties may have concluded in paragraphs 4, 5 and 6 of the plaintiff's particulars of claim has been superseded by the subsequent installment sale agreements and lease agreements concluded between the plaintiff and Wesbank and Capital Acceptances Ltd respectively.*

2. *It is declared that the defendant is despite the above, liable to the plaintiff in terms of the self-standing warranties furnished by it in respect of the vehicles referred to in paragraphs 22 and 23 of the particulars of claim, subject to the determination of the contexts of paragraph 13 of the defendant's plea.*

3. *The defendant is ordered to pay the plaintiff's costs of the separated portion of the trial to date hereof, including the costs of two counsel”.*

4. The appellant is ordered to pay the respondent's costs of the appeal.

J U D G M E N T

This matter has been heard by way of a virtual hearing and is otherwise disposed of in terms of the Directives of the Judge President of this Division. The judgment and order are accordingly published and distributed electronically.

DAVIS, J

[1] Introduction

In February 2009 the respondent to this appeal, Mivami Construction CC (Mivami) bought ten “tipper” trucks for an amount just short of R 8 million. The supplier of these trucks was the current appellant, Extreme Lifestyle Centre (Pty) Ltd (Extreme). The purchase of the trucks was financed through a bank (Wesbank) and a finance house (Capital Acceptances). The trucks (all imported from China and assembled in South Africa) suffered so many repeated breakdowns that Mivami found them unfit for the purpose purchased. It sought to hold Extreme liable, either on the basis that it had actually purchased the trucks from Extreme alternatively on the basis of a warranty furnished to it by Extreme. The court a quo (per Van Oosten J) found in favour of Mivami. Leave to appeal was refused by the court a quo but subsequently granted by the Supreme Court of Appeal to a full court of this Division.

[2] Proceedings in the court a quo

2.1 In its particulars of claim, Mivami pleaded as follows:

“12. During February 2009 the plaintiff, represented by Ruby Mphahlele entered into a partly oral and partly written agreement with the Defendant, represented by Mark Beukes, for the purchase of 7 Powerstar 40 – 35 8 x 4 tipper trucks ... (the motor vehicles).

13. *It was an express alternatively implied alternatively tacit term of the agreement alternative contemplated between the parties that the Plaintiff would apply for financial assistance for the purchase of the motor vehicles.*

14.1 *The written part of the agreement is set forth in Annexure "A" hereto.*

14.2 *In terms of Annexure "A":*

14.2.1 *The Defendant warrants to the first retail purchaser of the motor vehicles that the motor vehicles supplied by the Defendant and delivered by an authorised dealer of the Defendant will be free from defects in materials and workmanship under normal use for which the motor vehicles were designed for the periods stipulated from the dates of delivery...*

15. *In the premises the agreement between the parties contained an express warranty against any defects which would render the motor vehicles unfit for the purpose of constructing road surfaces being the normal use for which the motor vehicles were designed".*

2.2 Annexure A referred to in the particulars of claim consisted of a "Service Passport" and "Warranty Record" booklet contained in the storage compartment in each motor vehicle.

2.3 Extreme denied the allegations and, in respect of the warranty, pleaded that, "to the extent" that a court might find it to be part of the agreement between

Mivami and Extreme, the warranty was subject to exclusions, including the exclusion of claims for consequential damages. The attempt at distancing itself from liability under the warranty even led Extreme to plead “13.2.8 *the defendant complied with all/any obligations that it had in respect thereof (which are not admitted)*”.

2.4 As an alternative, Mivami pleaded as follows:

“22.1 *The motor vehicles were sold to Wesbank and Capital Acceptance by the Defendant.*

2.2 *The motor vehicles were delivered to Wesbank and Capital Acceptance as represented by the Plaintiff who on its behalf was represented by Ruby Mphahlele alternatively the motor vehicles were delivered by the Defendant directly to the Plaintiff represented by Ruby Mphahlele.*

22.3 *The motor vehicles were so delivered with the written warranty, a copy of which is attached hereto as Annexure “A”*
...

23.1 *The written warranty constitutes a binding undertaking alternatively warranty alternatively offer by the Defendant directly to the Plaintiff as first retail purchaser of the motor vehicles.*

23.2 *Alternatively the written warranty constitutes an agreement for the benefit of a third party, the Defendant being the promiser, Wesbank and Capital Acceptance being the promisee and the Plaintiff being the third party for whose*

benefit the warranty was entered into between the Defendant and Wesbank and Capital Acceptance.

24. *The Plaintiff accepted the benefits of the written warranty in that the Plaintiff as represented by Ruby Mphahlele and the Defendant as represented by its authorised employees agreed that the Defendant alternatively the Defendant's representatives would execute warranty repair work to the motor vehicles during the period February to May 2009".*

2.5 To these allegations Extreme merely pleaded a bare denial.

2.6 Prior to the first hearing of the matter on 14 March 2018, the parties formally agreed at a pre-trial conference that:

"7.5.1 the question whether an agreement as set forth in paragraphs 4, 5, and 6 of the Plaintiff's amended particulars of claim were entered into between the Plaintiff and the Defendant;

7.5.2 the issues raised by paragraphs 12, 13, 14, 15, 22, 23 and 24 of the Plaintiff's amended particulars of claim; and

5.5.3 the issues raised by paragraphs 13.2, 13.2.1, 13.2.2., 13.2.3, 13.2.4, 13.2.5, and 13.2.6 of the Defendant's amended plea must be separated from all the other issues and must be adjudicated upon first".

2.7 When the matter next came before court for trial on 18 February 2018, Van Oosten J, before proceeding with the hearing of evidence, ordered a separation of issues in terms of the above quoted paragraph 7.5 of the minutes of the pre-trial conference.

2.8 A separate document was also handed up, containing a set of agreed facts and admissions. These were the following:

- “2. *The seven Power Star Trucks referred to in paragraphs 4.1.1. to 4.1.7 of Mivami’s particulars of claim were trucks that were distributed by Extreme ...*
- 8. *It is common cause that Extreme sold the abovementioned Power Star Trucks to respectively Wesbank and Capital Acceptances as evidenced by the new vehicle tax invoices issues by Extreme ... and that Wesbank and Capital Acceptances had paid Extreme the full purchase price of each to these vehicles.*
- 9. *It is common cause between the parties that Mivami paid the full purchase price and rental prices of the abovementioned Power Star trucks to respectively Wesbank and Capital Acceptances”.*

2.9 At the trial before Van Oosten J, only Mr Mphahlele testified. Extreme closed its case, relying on the evidence given, concessions made in cross-examination and the agreed facts.

2.10 The learned judge in the court a quo dealt with Mr Mphahlele’s evidence of how one Beukes, introduced as a “*senior official or general manager of the SuperGroup, holding an interest in Zululand Commercial Vehicles, which he said was a dealership of the SuperGroup in Natal*”, had conducted himself. The summary of the evidence then went as follows: “*Beukes then embarked on an extensive showcasing of the Superpower trucks, of which Mr Mphahlele had no knowledge. Beukes with the usual*

sales repertoire and puffery, lauded the many exemplary qualities and capabilities of the trucks with the added benefit of extensive warranty cover, of course, to apply, one may assume he probably added, only in the unlikely event of problems being encountered”.

- 2.11 After Beukes had convinced Mr Mphahlele of the superior quality and capabilities and the trucks, Mivami agreed to buy ten trucks and, in confirmation thereof, sent a purchase order to Zululand Commercial Vehicles. This was in December 2008.
- 2.12 The judgment further continued: *“The date of the delivery was not yet agreed on as the annual builders recess was on hand and Mphahlele decided to stand this over to early the next year. In early 2009 he decided to obtain finance from Wesbank for and to purchase only 7 of the Powerstar trucks originally ordered The plaintiff’s application for finance was approved but Wesbank informed Mphahlele that the risk would have to be spread and shared with another finance company, known as Capital Acceptances Ltd. In consequence, written lease agreements were concluded between the plaintiff and Capital on 13 February 2009 in respect of four trucks and on 16 February 2009 installment sale agreements (were concluded) between Wesbank and the plaintiff ... in respect of the remaining three trucks”.*
- 2.13 The facts further found by the court a quo were that the trucks started displaying mechanical problems and “deficiencies” soon after delivery and once put into operation. They followed *“a long line of negotiation and correspondence in which the defendant (Extreme) sought to honour what it perceived to be its obligations under a standard written warranty issued with the sale of each truck, a copy of which, containing all the terms and conditions thereof, was left in the cubby hole of each truck when delivered”.*

- 2.14 After having endured the poor mechanical performance of the trucks for many months, the dispute between the parties reached an impasse. This was while the trucks were with Extreme, who had ostensibly repaired the trucks and offered them for collection. Mivami would have nothing of this and purported to cancel its agreement with Extreme. It issued the current summons, *inter alia* claiming confirmation of the cancellation and return of the purchase price. In the meantime, it had paid off Wesbank and Capital Acceptances.
- 2.15 Based on these facts, Van Oosten J found that an agreement of sale between Mivami and Extreme had been proven. He found that the goods to be sold and the price for them had been agreed on and that it did not matter that delivery only took place later.
- 2.16 The learned judge in the court a quo found that no intention had been proven whereby the parties had “*expressly agreed to replace the initial agreement with the finance agreements*”. The finding was that “... *in the absence of any conduct by the parties showing an intention to replace the initial agreement with the finance agreements, I hold that a novation has not occurred with the result that the initial agreement is still valid and binding between the parties*”.
- 2.17 Van Oosten J however went on to find, should he be wrong in the above conclusion, the dealer (Extreme) should still be held liable in respect of a breach of warranty, notwithstanding the sale of the vehicle by the dealer to the finance company in terms of a collateral agreement.
- 2.18 In addition, the court a quo found the warranty to have been a tacit term of the agreement between Mivami and Extreme.

2.19 The facts surrounding the warranty were later in the judgment described as follows: *“The warranty contains standard terms and conditions. It applied to all new Superstar trucks that were sold by the defendant irrespective of whether the purchaser agreed to it or not. For that reason a copy was simply left in the cubby hole of each new truck at the time of the delivery, for the benefit of the purchaser. No acceptance thereof by the purchaser was either required or necessary. The terms and conditions of warranties of this kind, in the new vehicle sales inducting are not negotiable as they are standard and factory underwritten. The plaintiff was at all times alive to the fact that a warranty applied and indeed demanded performance in terms thereof although not being aware of its exact until after cancellation of the agreement”*.

2.20 Having made the findings referred to above, Van Oosten J made following orders:

- “1. *It is declared that the parties concluded an agreement as referred to in paragraphs 4, 5, and 6 of the plaintiff’s particulars of claim.*
2. *The defendant’s warranty, a copy of which is annexed as annexure A to the particulars of claim is imported as a tacit term of the agreement referred to in paragraph 1 above.*
3. *The defendant is to pay the plaintiff’s costs of the action, such costs include the costs consequent upon the employment of two counsel”*.

- 2.21 *Ex facie* the judgment, no findings or order had been made in respect of the contents of paragraph 13 of Extreme's plea relating to exclusions from the warranty or consequential damages, being one of the separated issues.

[3] Evaluation

- 3.1 The first difficulty with the findings of the court a quo, if upheld, is that the result would be that there were two sets of agreements existing at the same time, concerning the same (eventual) seven trucks: one set, being installment sale and lease agreements between Mivami and Wesbank and Capital Acceptances respectively and a second set, being the sales of the same seven trucks between Mivami and Extreme. Having regard to the nature of the agreements, this could simply not be.
- 3.2 Having regard to the facts, however, the declaration by the court a quo is also, with respect, incorrect. After having decided to purchase the trucks, Mivami then made the decision to obtain finance. It applied to its banker, Wesbank for the trucks to be added to an existing Master Installment Sale Agreement. This included purchases of other vehicles from other suppliers or dealers which had already been financed by Wesbank. When Wesbank approved the financing by Wesbank of three trucks supplied by Extreme, it paid Extreme in full for the trucks and then sold them to Mivami. Mivami in turn, not only signed the installment sale agreements for the purchase of the trucks from Wesbank, but thereafter continue to pay Wesbank in terms of those agreements until the full purchase prices had been paid. The same happened with the other four trucks financed by Capital Acceptances, who, after having paid Extreme in full, then leased those four trucks to Mivami. Again, separate agreements were signed and Mivami continued to pay Capital Acceptances in full until the end of the leases.

- 3.3 The clear intention was that, in order to finance the purchase of the vehicles, Mivami purchased and leased them, not from Extreme, but from the finance houses. This also accord with the agreed set of facts referred to in paragraph 2.8 above.
- 3.4 Insofar as the principle of novation might find application where a new set of parties entered the picture, i.e Mivami and the finance houses and no longer Mivami and Extreme, the facts clearly support the conclusion that the initial intended agreements of purchase (insofar as they may have been finally concluded) had been novated and replaced by the agreements with the finance houses. Accordingly, the declaratory order contained in paragraph 1 of the order of the court a quo, could not be (or could no longer be) correct.
- 3.5 This would also entail that, insofar as the warranties may have been found to be tacit terms of the initial sales agreements, that basis for their existence would also fall away.
- 3.6 However, there is no evidence that the warranties themselves were novated or incorporated in the purchases and leases from the finance houses. The warranties were furnished as self-standing warranties marketed by Extreme. The fact that this was intended to be so, irrespective of the subsequent financing of the deals by way of installment sale agreements and leases from the finance houses, was manifested and confirmed by the extensive correspondence between Mivami (as customer) and Extreme (as the party who had furnished the warranties) which took place after the sales and leases and at each occasion when a truck broke down. As referred to in paragraph 2.13 above (and as found by the court a quo), Extreme considered it bound by the warranties and continued to attempt to repair the trucks (at its own cost). At no stage did Extreme disavow the warranty

obligations or the existence thereof once Mivami had purchased and leased the trucks from the finance houses (until litigation ensued, of course). This acceptance included the view that Mivami was the initial purchaser for purposes of the warranties despite the chronological insertion of the finance houses as purchasers.

- 3.7 The alternative claim pleaded in paragraphs 22 and 23 of Mivami's particulars claim had, in my view, sufficiently been proven.
- 3.8 Having reached the above conclusion, namely the existence of the warranty obligations in terms of self-standing undertakings it is not necessary to consider whether our law needs to be developed along the lines of English law as referred to in passing by Van Oosten J with reference to *Brown v Shea and Richmond Car Sales Ltd* [1950] All ER 1102 (KB) where a "car dealer was held liable on a type of extended supplier liability principle".
- 3.9 In the premises, the appeal should only be upheld insofar as it amounts to a correction of the basis of liability in terms of the warranty, but otherwise not. The result is still that the trial is to proceed on the quantum portion thereof and the remainder of the separated issues, including those mentioned in paragraph 2.21 above. As such, the appellant had not been substantially successful in avoiding liability in respect of the initially separated issues and costs should follow the event. Similarly, the costs order in the court a quo should be limited to the separated portion of the trial.

[4] Order

1. The appeal succeeds in part and the order in the court a quo is replaced with the following:

- “1. *It is declared that whatever agreement the parties may have concluded in paragraphs 4, 5 and 6 of the plaintiff's particulars of claim has been superseded by the subsequent installment sale agreements and lease agreements concluded between the plaintiff and Wesbank and Capital Acceptances Ltd respectively.*
2. *It is declared that the defendant is, despite the above, liable to the plaintiff in terms of the self-standing warranties furnished by it in respect of the vehicles referred to in paragraphs 22 and 23 of the particulars of claim, subject to the determination of the contexts of paragraph 13 of the defendant's plea.*
3. *The defendant is ordered to pay the plaintiff's costs of the separated portion of the trial to date hereof, including the costs of two counsel”.*
2. The appellant is ordered to pay the respondent's costs of the appeal.



N DAVIS
Judge of the High Court
Gauteng Division, Pretoria

I agree


 N V KHUMALO
 Judge of the High Court
 Gauteng Division, Pretoria

I agree



V P NONCEMBU
 Acting Judge of the High Court
 Gauteng Division, Pretoria

Date of Hearing: 16 February 2022

Judgment delivered: 18 July 2022

APPEARANCES:

For Appellant:

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