

REPUBLIC OF SOUTH AFRICA



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

CASE NO: 15864/2012

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: YES
(3) REVISED

25 FEBRUARY 2020 FHD VAN OOSTEN

In the matter between:

MIVAMI CONSTRUCTION CC

PLAINTIFF

and

EXTREME LIFESTYLE CENTRE (PTY) LTD

DEFENDANT

J U D G M E N T

VAN OOSTEN J:

Introduction

[1] This matter in essence turns upon the question whether or not a binding agreement in respect of the purchase and sale of seven Powerstar tipper trucks in 2008, came into existence between the parties, on the terms alleged by the plaintiff. It is the defendant's case that no agreement whatsoever was entered into with the plaintiff.

[2] The plaintiff issued the summons in this action against the defendant on 19 March 2012. In the amended particulars of claim the plaintiff claims, in claim 1, cancellation of

the agreement that allegedly was entered into with the defendant, and in claim 2, payment of the amount of R7 940 100-00, being the purchase price paid in respect of the seven trucks. The main cause of action is based on an oral agreement entered into between the parties to which several alternatives were added in the subsequent amendment of the particulars of claim. For present purposes, I do not consider it necessary to refer in any detail to the amendments.

Separation of issues

[3] At the commencement of the trial before me, and in terms of an agreement between the parties, I ordered a separation of the issue whether an agreement as relied upon by the plaintiff, on the terms pleaded, was entered into between the parties, from the remainder of the issues and the trial proceeded on the separated issue only. The issue is set out in the pleadings, and the separation order refers to the specific paragraphs in the pleadings that are relevant to the determination of the separated issue.

Factual background

[4] The plaintiff conducted business in civil construction, for which it utilised construction equipment, colloquially referred to as yellow machines, and a fleet of heavy haulage tipper trucks. The plaintiff is a registered close corporation of which Mr Ruby Mphalele (Mphalele) is one of its two members. Mphalele was the only witness called to testify at the trial. His evidence was not challenged either as to its contents or credibility.

[5] The defendant is a registered company, which conducted business in Kempton Park, operating a workshop in Elandsfontein, as part of the Super Group and at the time, as an authorised dealer in and distributor of new Powerstar tipper trucks, which are the subject matter of this case. The trucks are of Chinese origin and assembled in Pietermaritzburg, from where they were distributed to the various Super Group's dealerships, including one which has some relevance for present purposes, known as Zululand Commercial Vehicles, a close corporation, presently in voluntary liquidation, of which Mark Christopher Beukes (Beukes) was and still is a member. Beukes moreover, at times, as will become apparent, also represented the defendant and the Super Group in writing emails to Mphalele, concerning the trucks purchased by the plaintiff.

[6] Towards the end of 2008, the plaintiff became interested to expand its fleet of mainly Fiat and Ford trucks in order to meet the demands of construction works contracts it had

been awarded, relating to the upcoming World Soccer Cup event, which was to take place in 2010. During October/November 2008 a meeting took place at the plaintiff's business premises, in Bredell, Kempton Park, between Mphahlele, Ndebele (also a member of the plaintiff), and Gordon Randall (the plaintiff's financial and business advisor), on the one side, and Beukes on the other.

[7] Beukes introduced himself as a senior official or general manager of the Super Group, holding an interest in Zululand Commercial Vehicles, which he said was a dealership of Super Group in Natal. Beukes then embarked upon an extensive showcasing of the Superpower trucks, of which 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. But, when Beukes assured them that the Superstar trucks were, in reality, 'another version of the Mercedes Benz trucks' with in addition a bigger load capacity than Mercedes Benz trucks, Mphahlele's indecision in purchasing the newcomer trucks crumbled into oblivion.

[8] The parties then and there agreed that the plaintiff would buy altogether ten Superstar tipper trucks from Zululand Commercial Vehicles, for the total purchase price of R10 203 000-00. In confirmation thereof, a printed order under the name of the plaintiff and containing its particulars, was made out and signed, with the date 8 December 2008 inserted, addressed to Zululand Commercial Vehicles, for 10 Powerstar, 4035K, 15 cube tipper trucks, at a unit price of R895 000-00 each, excluding VAT, and a total purchase price of R10 203 000-00, inclusive of VAT.

[9] The date of delivery was not yet agreed on as the annual builder's 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. A master instalment sale agreement between the plaintiff and Wesbank had been in existence since 14 September 2006. 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 (Capital). In consequence, written lease agreements were concluded on 13 February 2009 between the plaintiff and Capital in respect of four trucks and on 16 February 2009, instalment sale agreements between the plaintiff and Wesbank (each specifically incorporating the terms and conditions of the 2006 Master Instalment Sale Agreement), in

respect of the remaining three trucks. In respect of each truck financed, the defendant rendered a New Vehicle Tax Invoice, made out to the particular finance company, containing a full description of the truck, the purchase price and reflecting that the truck would be delivered to the plaintiff.

[10] In terms of the lease and instalment sale agreements, the trucks were delivered to the plaintiff by the defendant on behalf of the finance company, as the seller thereof, and the finance company was and remained the owner thereof until final payment of all amounts due in terms of the agreement, had been effected by the plaintiff. All the agreements moreover, contain a *voetstoots* clause in favour of the finance company (collectively referred to as 'the finance agreements').

[11] On 6 March 2009 the plaintiff duly paid the amount of R150 000-00 into the bank account of Zululand Commercial Vehicles, which was the deposit required in respect of the purchase of the said trucks.

[12] Soon after delivery of the trucks to the plaintiff and while operating on construction sites in Polokwane, mechanical problems and deficiencies emerged. Then followed a long line of negotiations and correspondence in which the defendant 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. Mphalele testified that he was never made aware of the warranty terms and conditions and only discovered that the document existed during a visit some eight months later, to the defendant's premises in Elandsfontein, where the trucks were and still to this day, are parked.

[13] Just to conclude the narrative, the plaintiff having endured the poor mechanical performance of the trucks and according to him, the inefficient manner in which the repairs were performed by and on behalf of the defendant over many months, in May 2009 cancelled the agreement of sale. The defendant on the other hand, contended that the trucks had, albeit eventually, all been properly repaired and the trucks were offered ready for collection by the plaintiff from 26 May 2009 onwards. The plaintiff however, refused to take delivery and issued summons for confirmation of its cancellation of the sale agreement and a refund of the purchase price paid. In the meanwhile the plaintiff continued with the payments in terms of the finance agreements, which by 2014 were all fully paid.

Discussion

[14] Against this background, a legal construction needs to be placed on the facts, in order to determine the contractual relationship between the parties. The point of departure is to consider the initial negotiations between the parties and the result thereof. It is trite that a contract of sale becomes *perfecta* when agreement is reached on two essential elements: first, the thing sold and second, the price, to which must be added that the contract must not be subject to a suspensive condition. These principles were recently re-affirmed by the Supreme Court of Appeal in *Starways Trading v Pearl Island Trading* (232/2018) [2018] ZASCA 177 (3 December 2018); 2019 (2) SA 650 (SCA) para [9].

[15] Applied to the facts of the present matter, these elements are both clearly satisfied. The trucks were duly and properly identified and the price agreed upon. An order confirming the agreement was signed and executed. As was held in *Starways*, the fact that the date of delivery was not specified at that stage does not alter the position.

[16] The defendant's bare denial that any agreement whatsoever was concluded with the plaintiff, accordingly cannot stand.

[17] The more pertinent issue arising for determination, is the effect that must be given to the lease and instalment sale agreements on the initial contract concluded between the parties. The answer, in my view, is to consider whether a novation of the original contract had occurred by the conclusion of the finance agreements. Neither party approached the matter in the pleadings or in argument before me, on this basis. Counsel for the defendant, however, conceded that novation was central to the determination.

[18] The principles underlying novation have crystallised in many reported judgments to these. In *Acasia Mines Ltd v Boshoff* 1958 (4) SA 330 (AD) 337, Beyers JA held:

‘...novation is essentially a question of intention: when parties novate they intend to replace a valid contract by another valid contract.’

In the present case there is no evidence that the parties expressly agreed to replace the initial agreement with the finance agreements. Whether a novation did in fact take place, can only be determined by way of inference. The intention to effect a novation cannot be

held to exist except by way of necessary inference from all the circumstances of the case (See *Electric Process Engraving and Stereo Co v Irwin* 1940 AD 220 at 226/7). The circumstances of the case, the then Appellate Division held, in *French v Sterling Finance Corporation* 1961 (4) SA 732 (A) 736 H, 'of course include the conduct of the parties'.

(See also: *Rodel Financial Service v Naidoo and Another* 2013 (3) SA 151 (KZP) para 13; *Barclays National Bank v Smith* 1975 (4) SA 675 (D); *Plett Building Supplies CC t/a Plett Build It v Mgobo* (2906/2013) [2016] ZAECPHC 60 (22 September 2016) para [18] – [20]; *Scania Finance SA v Kaknis* (1271/2010) [2010] ZAECPHC (15 August 2010) para [7]; and *Gondwana Marketing v Birch* (A903/2011) [2014] ZAGPPHC 125 (12 March 2014))

[19] The conduct of the parties, subsequent to the conclusion of the finance agreements, can be gleaned from the extensive correspondence that was exchanged between them over a period of some eight months after the conclusion of the finance agreements. As a starting point and before delving any deeper into the correspondence, it is of significance that although demands were made and challenges arose in regard to the after sales warranty on the trucks, not one single reference to, let alone reliance on, the terms of the finance agreements was made. To the contrary, the parties conducted themselves throughout as if the initial agreement was the one and only agreement between them.

[20] The defendant, at all times, assumed the position of the seller/dealer of the trucks. In the welcoming letter of the defendant to the plaintiff, dated 3 March 2009, when the finance agreements had already been negotiated and concluded, the plaintiff is given the promise that it is the defendant's and its dealerships' intention to 'exceed customers' expectations in all of our business with you'. When the plaintiff's experienced mechanical difficulties with the trucks, those were brought to the defendant's notice, resulting in a 'full inspection of the trucks purchased' by the defendant to 'ensure that all problems will be solved'. Once again the plaintiff was reminded of their commitment to 'our customers at all times'. Reference was made to 'our manufacturer's warranty terms and conditions' which 'the selling dealer should have, at the time of the hand over, explained'.

[21] On 2008 Mphalele wrote to the defendant informing them 'that Mivani Construction has cancelled the deal of the seven trucks bought from Super Group due to endless problems experienced by Mivami since delivery'. In an email dated 5 June 2009, the defendant in summarising the situation, states that 'The customer, Mivami Construction,

purchased 7 X 40.35 Powerstar trucks from Zululand Commercial Vehicle Sales in February 2009'. Although the email meticulously recounts the history of the matter, no mention at all is made of the finance agreements. Everything said in the email, in all respects, is consistent with the position that would have prevailed, absent the finance agreements. As late as on 9 October 2009, Beukes, writing on behalf of the Super Group, reiterated that the trucks were still available for collection, and that 'the vehicles remain legally yours'. He even offered his assistance to sell the trucks and added that he had already referred a potential buyer to the plaintiff.

[22] I conclude 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 (the agreement).

[23] Should I be wrong in the conclusion I have arrived at, an alternative basis for holding the defendant liable requires consideration, with reference to the English case, *Brown v Sheen and Richmond Car Sales Ltd* [1950] All ER 1102 (KB). There the car dealer was held liable, in respect of a breach of a warranty as to the condition of the vehicle at the date of the sale, notwithstanding the sale of the vehicle by the dealer to the finance company in terms of a hire purchase agreement, which it was held, constituted a collateral agreement. Although not yet known in our law of contract, I agree with AJ Kerr, *Principles of the law of contract* (6th ed) that there is no reason for not incorporating this principle into our law of contract.

The warranty terms and conditions

[24] One final issue requires determination. It is this: do the defendant's standard warranty terms and conditions (a copy of which is annexed to the plaintiff's particulars of claim as annexure 'A') form part of the agreement?

[25] The application of well-entrenched basic principles relating to tacit terms of an agreement, readily provides the answer. In *Visagie & Associates CC & Another v Small Enterprise Finance Agency Ltd* (262/2018) [2019] ZASCA 32 (28 March 2019), these principles were reiterated as follows:

'It is well established that a tacit term is 'an unexpressed provision of the contract which derives from the intention of the parties, as inferred by the court from the express terms of

the contract and the surrounding circumstances (*Alfred McAlpine & Son v Transvaal Provincial Administration* 1974 (3) SA 506 (A) 531H). A court will be slow to import a tacit term into a written contract (*Wilkins NO v Voges* 1994 (3) SA 130 (A) 136-7). In *Wilkins* this court said:

‘A tacit term, one so self-evident as to go without saying, can be actual or imputed. It is actual if both parties thought about a matter which is pertinent but did not bother to declare their assent. It is imputed if they would have assented about such a matter if only they had thought about it - which they did not do because they overlooked a present fact or failed to anticipate a future one. Being unspoken a tacit term is invariably a matter of inference. It is an inference as to what both parties must and would have had in mind. The inference must be a necessary one: after all, if several conceivable terms are all equally plausible, none of them can be said to be axiomatic. The inference can be drawn from the express terms and from admissible evidence of surrounding circumstances. The onus to prove the material from which the inference is to be drawn rests on the party seeking to rely on the tacit term. The practical test for determining what the parties would necessarily have agreed on the issue in dispute is the celebrated bystander test. Since one may assume that the parties to a commercial contract are intent on concluding a contract which functions efficiently, a term will readily be imported into a contract if it is necessary to ensure its business efficacy; conversely, it is unlikely that the parties would have been unanimous on both the need for and the content of a term, not expressed, when such a term is not necessary to render the contract fully functional. The above propositions, all in point, are established by or follow from numerous decisions of our courts.’

[26] 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 of the booklet containing the terms and conditions of the warranty was simply left in the cubby hole of each new truck at the time of 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 industry, 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 terms until after its cancellation of the agreement. I have no doubt that had the bystander test been applied, both parties would at any time have been unanimous that the defendant's standard

warranty did apply. Importation of the warranty by way of a tacit term to the agreement promotes and ensures business efficacy and in my view, is fully warranted in the circumstances of this case.

Order

[27] In the result I make the following order:

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 plaintiff's 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 to include the costs consequent upon the employment of senior counsel.

FHD VAN OOSTEN
JUDGE OF THE HIGH COURT

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DATES OF HEARING
DATE OF JUDGMENT

18 & 19 FEBRUARY 2020
25 FEBRUARY 2020