

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

Case No: A24/2014

In the matter between:-

JOE REGAL TAXIDERMY CC

Appellant

and

MUIZEN MOTORS (PTY) LTD

Respondent

CORAM:

MOLOI, J *et* POHL, AJ

JUDGMENT BY:

POHL, AJ

HEARD ON:

1 SEPTEMBER 2014

DELIVERED ON:

4 SEPTEMBER 2014

POHL, AJ

BACKGROUND

[1] This is an appeal from the magistrate's court against the magistrate's judgment and order of absolution from the instance. There is no cross-appeal.

[2] The appellant's claim against the respondent is based on contract. From the particulars of claim it appears that the appellant contracted with the respondent to perform a mechanical service to the appellant's vehicle. It is the appellant's case that the respondent breached that contract in that:

- (i) it failed to perform the mechanical service with the necessary skill and diligence and in a proper workmanlike fashion;
- (ii) it failed to replace the vehicle's gearbox oil; and
- (iii) failed to insert the correct amount of gearbox oil.

It is furthermore the appellant's case that as a result of the said breach of contract the vehicle's gearbox was damaged. In the premises the appellant suffered damages in the amount of R14 802.40, being the fair, reasonable and necessary costs of repairs to the vehicle.

- [3] In its plea, the respondent pleaded that it was only contracted to perform a lubrication service to the vehicle and other incidental work. The instruction was not to change the gearbox oil. It however did fasten two bolts on the gearbox and also added 500ml of oil to the gearbox.

COMMON CAUSE FACTS AND/OR FACTS NOT IN DISPUTE

- [4] It would appear from the record that the following facts are common cause and/or not in dispute:

- (a) The job card which was completed by the administrative clerk of the respondent and received in evidence as exhibit "C", reflects the work that had to be done to the vehicle and was duly signed by the sole member of the appellant, Mr Regal, after it was made.
- (b) Exhibit "C", reflects only the following work that had to be done to the vehicle:

- (i) service;
 - (ii) small oil leak;
 - (iii) put front number plate on;
 - (iv) rotate tires; and
 - (v) check brakes.
- (c) Exhibit "C" also contains a portion, which was apparently completed after the work was done, and which indicates what consumables were used. It *inter alia* indicates that 500ml of gearbox oil were used.
- (d) When the gearbox was drained by the appellant's second witness, one Harding, it was found it contained only 500ml of gearbox oil. This witness is a specialist gearbox mechanic and he performed the repairs to the gearbox subsequent to the service the respondent performed on the vehicle. The gearbox was supposed to have 2.7 litres of oil in it.
- (e) The fourth, fifth, sixth gears were heat damaged due to the fact that there was too little oil in the gearbox.
- (f) The oil leak that the appellant complained of stopped after the respondent fastened the two nuts on the vehicle's gearbox.
- (g) The vehicle in question was bought by the appellant as a second hand vehicle and it had already done 105 234km at the time of the said lubrication service.

- (h) An hour after Mr Regal collected the vehicle from the respondent after the service was completed, he telephoned Mr Kruger of the respondent and told Mr Kruger that he forgot to mention to him that he also had problems with the fifth gear of the vehicle. He indicated that it made a noise when he wanted to engage the fifth gear. Mr Kruger responded by telling the appellant and advised him that he, the appellant, should take the vehicle to a gearbox specialist as the respondent was not an expert on gearboxes.
- (i) Regal, however, waited for almost a month before he took the vehicle to the gearbox specialist, the witness Harding. In this time the vehicle had done in excess of a 1 000km since the service by the respondent.
- (j) Regal had problems with the fifth gear of the vehicle for at least two weeks prior to him taking the vehicle to the respondent for the service.
- (k) The vehicle made a screeching sound when the fifth gear was engaged. The cause of this screeching sound was, however, not the lack of oil in the gearbox but was caused by a worn-out part known as a “syncro”.
- (l) The appellant’s expert witness, Harding, conceded that he could not say for how long and for what distance the vehicle travelled with only 500ml of oil in its gearbox prior to the

vehicle being serviced by the respondent. He also conceded that he could not say what damage was thus caused to the gearbox prior to the vehicle being serviced by the respondent.

- (m) The respondent was not a gearbox specialist.
- (n) The gearbox did not have a dipstick to measure the amount of oil it. The insufficient level of oil in the gearbox, however, became immediately apparent to the appellant's expert witness when the gearbox specialist, Harding, opened it.

THE ISSUES IN DISPUTE

- [5] The first issue in dispute was whether or not the appellant instructed the respondent to replace the gearbox oil; the second issue in dispute was whether or not the respondent did put 500ml of gearbox oil into the gearbox and the third issue in dispute was whether or not the damage to the fourth, fifth and sixth gears was causally connected to anything the respondent did or did not do or should have done but did not do based on the contract between the parties.

THE ONUS

- [6] It is trite that the party who relies on a contract bears the *onus* to prove same. That includes the causal connection between the alleged breach of contract and the alleged consequential damages: **Afrox Health Care Beperk v Strydom** 2002 (6) SA 21.) *In casu* the *onus* thus rested squarely on the appellant.

THE EVIDENCE IN RELATION TO THE ISSUES IN DISPUTE

[7] The first issue in dispute is the question whether or not the appellant instructed the respondent to replace the gearbox oil: It is first of all important to have regard to the fact that the job card, exhibit "C" does not contain an instruction to do so. Secondly, it must be borne in mind that Regal did not know what the origin of the oil leak was. Thirdly, Regal only told the respondent's Kruger after he collected the vehicle that he had experienced trouble with the gearbox prior to the said lubrication service. The appellant's own expert witness, Harding, testified that under normal circumstances the gearbox oil would not be replaced during a normal lubrication service such as done by the respondent. Although Regal testified that a day prior to the service he told Kruger to replace the gearbox oil, this was disputed by the respondent. This allegation was, *inter alia*, not borne out by the job card nor the fact that he did not know what the origin of the oil leak was. I am satisfied that the appellant did not instruct the respondent to replace the gearbox oil.

[8] The fact that the respondent's mechanic fastened the two nuts on the gearbox does not mean that respondent was instructed to replace the gearbox oil. If it is accepted that the respondent added 500ml of oil, it does not necessarily follow that it was instructed to do so. On the evidence it was done because they realised that there was a small oil leak at the gearbox which was rectified by the fastening of the two nuts. In the premises the appellant did not succeed to prove on a balance of probabilities

that it was a term of the contract between the parties that the respondent had to or was instructed to, replace the gearbox oil. Regarding the issue whether or not the respondent did add 500ml of oil to the gearbox, the following must be borne in mind: The job card indicates that 500ml of gearbox oil was in fact used. Only 500ml of oil was found in the gearbox when it was eventually opened. The witness, Kruger, stuck to his evidence that he in fact did so, despite the fact that the access to the filling point on the gearbox was difficult to reach. He used an adaptive device to do so. In the premises I am satisfied that respondent did in fact add 500ml of gearbox oil.

- [9] With regards to the third issue in dispute, namely whether or not there is a causal connection between the damage to the gearbox and something the respondent was contractually obliged to do or not to do, the following must be borne in mind: I already found that it was not part of the instruction to the respondent to replace the gearbox oil. The most damning piece of evidence to the appellant's case in this regard, was the evidence by its own expert witness, Harding, where he testified that he could not say for how long and for what distance the vehicle travelled with only 500ml of oil in its gearbox prior to the vehicle being serviced by the respondent. He also conceded that he could not say what damage there was to the gearbox prior to the vehicle being serviced by the respondent. Furthermore it is common cause that the appellant was advised by the respondent on the day of collection of the vehicle after the lubrication service, to take the vehicle to a gearbox expert. The appellant, however, decided not

to do so and used the vehicle instead for almost a month before it did so. In this month the vehicle travelled a further 1 000km or more.

[10] In the premises it cannot be said that the appellant proved on a balance of probabilities that the damage to the gearbox was causally connected to anything that the respondent was contractually obliged to do or not to do, even if a tacit or an implied term is read into the contract - **South African Maritime Safety Authority v Mckenzie** 2010 (3) SA 601 (SCA) at page 610 paragraph 12. The court *a quo* could have dismissed the appellant's claim with costs. It however granted absolution from the instance. As there is no cross appeal before this court, this court is not inclined to interfere with that order.

[11] I would therefore make the following order:

1. The appeal is dismissed with costs.

L. le R. POHL, AJ

I concur, it is so ordered.

K. J. MOLOI, J

On behalf of appellant: Adv. M.D.J. Steenkamp
Instructed by:
Maree, Van Wyk Inc.
BLOEMFONTEIN

On behalf of respondent: Adv. W. Oberholzer
Instructed by:
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