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

Reportable / Not Reportable
Case No: Court *a quo:* **5476/2019**
Appeal Case No.: **A167/2023**

In the matter between:

ROUTE MANAGEMENT (PTY) LTD t/a BUSAF BAUER Applicant

and

MISTY SEA TRADING 296 (PTY) LTD t/a
PROJECT LOGISTICS MANAGEMENT Respondent

Neutral citation: *Route Management (Pty) Ltd v Project Logistics Management, Appeal no.: A167/2023*

Coram: **Mbhele, AJP, Van Rhyn, J, et Grobler, AJ**

Heard on: **31 January 2025**

Delivered on: This judgment was handed down electronically by circulation to the parties' representatives by email and released to SAFLII. The date and time for hand-down is deemed to be at 10h45 on 21 February 2025.

Summary: **The nature of the transaction between the parties was tripartite. The agreement between the Appellant and the Respondent was one of manufacture, and the rights of**

common law owner was obtained via cession by the Respondent from the financier of the merx. These agreements were all interlinked and related. Cause of action on the sale agreement only did not negate the terms of the manufacturing agreement. Respondent failed to show breach of the manufacturing agreement.

ORDER

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1. The appeal succeeds with costs, such costs to include the costs of two counsel where so employed, on scale C for senior- and scale B for junior counsel.
2. The order of the court *a quo* is set aside and replaced with the following:
   2.1 The claim is dismissed with costs, such costs to include the costs occasioned by the application for absolution from the instance, and counsel fees on scale B.

JUDGMENT

GROBLER AJ:

INTRODUCTION:

[1] This appeal concerns an order granted by a single Judge of this division on 20 June 2023. The learned Acting Judge allowed the Respondent's (*'Project Logistics')* claim against the Appellant (*'Route')* for payment of R564,300.00, interest and costs. Route approached this Court on appeal with leave of this Court.

[2] The court *a quo* found for Project Logistics on two essential points. The first

is that Route's standard terms and conditions, applicable when it manufactures and sells a trailer to any prospective customer, did not apply in the present case because the transaction forming the subject matter of the case on appeal was a contract of sale only. The second is that Route had breached the terms of the agreement, because trailing arms on the manufactured trailer only had a clearance height of ninety-seven millimetres from the ground. The end result of the design was that the trailer snagged on the ground when reversed or towed over speed humps, gate rails, rail crossings and other protrusions on the road. Without more the court *a qou* found this to be a breach of the sale agreement.

THE SALIENT FACTS/PLEADINGS AND CONSEQUENT CONTENTIONS:

[3] Most of the facts are common cause.

[4] Project Logistics approached Route in September 2017 to manufacture what was called a tri-axel step deck trailer for use in Project Logistics' transport business. Route professed to the general public that it is an expert in all matters of trailer building. The trailer was required to have a deck height of 950 mm, and it was requested that the combination length of the trailer (when coupled to a truck tractor) should not exceed 18, 5 meters

[5] Mr Barne Viljoen of Route then supplied Mr du Bourgh and Mr Webb of Project Logistics with a quotation and drawing of the proposed trailer. All the technical specifications and details of the design emanated from Route. On 6 November 2017, Mr Du Bourgh wrote to Mr Viljoen accepting the quotation and drawing, but enquiring on whether the proposed axles may be changed from 12 ton to 13-ton weight carrying axles, and what the associated cost would be. Mr Viljoen replied that the axles may be changed at no extra costs. The trailer was ultimately tailor made for Project Logistics. This is so even though the initial, engaging response from Route was to supply Project Logistics with three examples of trailers it had manufactured in the past for

Project Logistics choice, which were substantively similar to what Project Logistics required.

[6] In November 2017, Mr Du Bourgh sent an email to mr Van Niekerk of Reichmans Capital ('Reichmans'). Reichmans was approached to finance the trailer and it agreed. This was at the behest of Project Logistics. There is many correspondence that followed between all concerned (including Reichmans) subsequently. The trailer was ultimately delivered in March 2018, with 13-ton axles and a 13-ton air suspension. Route invoiced Reichmans for the trailer, Reichmans paid and insisted that ownership of the trailer be registered in its name.

[7] Project Logistics' testimony is that it started encountering problems with the trailer almost from the get- go. Some of the issues were resolved, but lingering were that the combination length of the tractor truck and trailer exceeded 18,5 meters, the lower deck of the trailer did not run level when the trailer was coupled to a tractor truck and the trailer suspension and trailing arms snagged on the ground when the trailer was being reversed or when the trailer was being towed forward, over speed bumps and the like.

[8] After much ado in attempts to remedy what Project Logistics experienced and after some expressed exasperation by Mr Webb, the trailer was delivered back to Route. It would appear that the trailer travelled approximately fifty-eight thousand kilometres when it was given back. The claim was then instituted seeking repayment of the purchase price of the trailer, and after Reichmans had ceded its rights qua common law owner to Project Logistics. The claim was instituted on the sale portion of the transaction only.

[9] Some interposition is necessary; - Mr Hoar, for the Respondent, I think correctly submitted that what Project Logistics initially and truly wanted was a trailer of a specific length, with a nine hundred and fifty millimetre deck

height.[1] Route provided a design and drawing for said trailer, and at a certain stage Project Logistics had asked for adjustments on the trailer because it wanted a different suspension, and different axles. Different wheels were sought as well. All this is uncontentious, and it is equally uncontentious that Route ultimately provided what it said it would. That is not where the true dispute is.

[10] It could only ever have been common cause (although Route somewhat strangely denied initially that it had concluded such a transaction) that Reichmans bought the trailer from Route. Much was made in the Heads of Argument filed for Route of documents serving as aliunde evidence to show that "the [Route] Client" was none other than Project Logistics. And all this in an attempt to buttress its case in the plea filed, which was that the *sale* agreement it concluded was with Project Logistics and not Reichmans. To my mind Route was mistaken, and I agree with Hoar when he submitted that the sale part of the transaction was between Route and Reichmans. This argument found favour with the court a *qou* as well.

[11] Project Logistics argued and presented its case on the basis that the transaction was one of pure sale. At least that is what it pleaded its case to be, thereby arrogating the right to rely on the sale agreement only. That is because, and of some significance, the Route standard terms and conditions document provided by Route on at least two occasions that I could count when the parties were still discussing the specifications of the trailer, stated that should the trailer be supplied in accordance with instructions and/or specifications and/or dimensions specified by Project Logistics, the latter would have no claim of whatsoever nature against Route should the trailer not be suitable for the purpose it was purchased and as required, and for any loss or damage Project Logistics might suffer as a result of any error,

[1] The court a qou found against the Respondent on the length argument. That finding was correct, the Appellant could never objectively have provided a trailer which would under all circumstances be of a specific length. That is because all agreed that measurement is fundamentally influenced by the length of the tractor, and there is no one size fits all tractor.

result of any error, discrepancy or deficiency in such instructions and/or specification and/or dimensions. This is expressly set out in clause 8.1 of that standard document. In presenting its case as a quintessential sale, Project Logistics argued that this clause did not bind, because it did not and could not have had anything to do with Reichmans. Ingenious certainly, but on the basis I explain below, flawed. Indeed, it is raised by its own petard

<u>THE CONTRACTS:</u>

[12] As I have mentioned, Mr Hoar argued that the Project Logistics' case was simply based upon an agreement of sale having been concluded between Reichmans and Route. He submitted that the particulars of claim only went that far, and that Route had failed to plead any other agreement governing the relationship between it and Reichmanns.

[13] For Mr Hoar it was incumbent upon Route to plead the terms of any specific contract otherwise and name it, and if it were of intent to prove that this was no simple sale agreement.

[14] Mr Snellenburg (appearing with Mr Groenewald) for Route submitted to this that what Project Logistics was attempting to do was to cherry-pick the terms of the actual transaction between the parties that suited it, whilst – under the guise of asserting a sale agreement only – wishing to avoid other terms.

[15] This point was debated at some length in argument before us. I have no doubt that Mr Hoar is correct when he says that the terms upon the sale agreement only were relied upon – at least in its particulars of claim. And it seems evident that the court *a quo* dealt with the case as if it were a simple sale transaction and a sale transaction only.

[16] All the evidence led however, and to my mind, these cannot support a case in terms of which the court should have dealt with the matter as if it were a

simple sale transaction. It is for that reason that the court *a quo* ultimately found that the Route standard terms and conditions did not apply. It seems to me rather clear that what was in fact here concluded was a tripartite transaction between Route, Project Logistics and Reichmanns. That clearly was the arrangement and respectfully I think this is the decision that the court *a quo* should indeed have made. All the evidence provided, I think the court a *qou* misdirected itself through heavy and exclusive reliance on the pleadings at the end of the case.[2] The court was to determine the true dispute, and certainly was not bound to the name the parties gave to the transaction or contract. Granted; - the plea filed for Route did not make the court a *qou's* task easier.

[17] When confronted with what we thought was the true nature of the transaction, Mr Hoar told us that *Koen J* had written a judgment where he dealt with the relationship between parties inter se concerning a sale of an asset that was ultimately financed by a third-party financial institution. I was able to source the decision of *Maharaj's Coach and Bus Hire CC v Dealership Middelburg Man (Pty) Ltd and 2 Others*[3]. The facts of that case are specific to the matter that served before that court, but in para 25 *Koen J* held as follows (after dealing with the terms of the agreement between the parties inter se):

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[2] See on these decisions such as: *Sentrachem Beperk v Wenhold, 1995 (4) SA 312 (A) at 320.* The then Appellate Division held as follows on this:

> *'Waar al die relevante getuienis voor die hof is, hoef daar myns insiens nie meer soveel nadruk op die pleitstukke gelê te word nie, maar behoort hierdie hof die saak te beslis op die werklike geskilpunte wat gedurende die verloop van die verhoor in die hof a quo uitgepluis is.'*

See also; - Hos+Med Medical Aid Scheme v Thebe Ya Bophelo Healthcare Marketing & Consulting (Pty) Ltd and Others [2008] (2) SCA para 31. The court referred to *Shill v Milner* [1937] AD 101 at 105. See also *Mcgrane v Cape Royale The Residence (Pty) Ltd* [2021] ZASCA 139 at para 22.

[3] *Case No. 14058/2018 Pietermaritzburg High Court, 10 August 2022.*

'As much as the above agreements must each be interpreted on their own, they are all part of a composite tripartite transaction which incorporates the terms of the individual agreements. Alternatively, and in any event, even as separate self-standing agreements, they are interdependent.'

[18] I do not believe that it was one contract ultimately concluded between all three of these parties. But I do believe that the individual contracts were interlinked, interdependent upon one another. There wouldn't have been one had there not been the other, which to my mind means Koen J was correct when he held that – as is the case in the present matter – the agreements are self- standing agreements. One is to distinguish between the holistic transaction and the enforceable agreements that underlie it. All this means in the present case is that the agreement between Route and Project Logistics was one of manufacture, the agreement between Route and Reichmanns was one of sale and between Reichmanns and Project Logistics was one of credit extending finance. All bound those agreeing to them.

[19] Significantly this means to my mind that the Route standard terms and conditions would always bind between it and Project Logistics. That the plea denied selling to Reichmans, or pleading nothing positively of a specific [manufacturing] contract and naming it thus does not matter. It appears to me clear that this was the transaction viewed as a whole.

NO BREACH:

[20] The court *a quo* found in favour of Project Logistics simply because the trailing arms had a clearing height of ninety-seven millimetres from the ground. The court *a quo* found that the manufactured trailer was not fit for the purpose for which it was designed, and *viewed* this to be a breach of the manufacturing contract. I have difficulty with this, because it does not axiomatically follow that that clearance height amounted to breach at all. If the parties agreed on that height, or that is what Project Management

wanted, or told Route that is what it wanted, or approved a design where that was the height, it cannot be said that Route breached the agreement when it delivered a trailer with those trailing arms clearing height, regard being had to the fact that the height of the trailer was 170mm from the ground with its original 12-ton suspension.

[21] Mr Hoar was ably alive to this, and from this realization the morphed gist of the dispute. Mr Hoar submitted that there was a duty upon Route *qua* expert trailer manufacturer to advise Project Logistics on detrimental implications of changing the suspension, wheels and axles on the trailer as well. Vacuously this is correct and this caused some debate before, because the sale agreement punted and relied upon by Project Logistics could not have incorporated any designing advice *viz-a-viz* Reichmanns. That would be a logical non- sequitur, because all the evidence showed that Reichmans did not require anything specific re dimensions, clearance heights etc. All Reichmans wanted was for Route to deliver a trailer of the nature and overt qualities to Project Logistics as it [Route] promised. This is also why Reïcmans agreed with Project Logistics that should there be any functionality issues with the trailer, that would be of no concern to Reichmans.

[22] And when Mr Viljoen testified for Route, he was cross-examined (somewhat uncontested by counsel then appearing for Route) on advice duties Route had apropos the design and advice on the functionality of the trailer. From here – as I understood Mr Snellenburg's argument – the cherry-picking of contractual terms as and when these suited Project Logistics. I think this is correct on the whole as an accusation against Project Logistics, but the problem with Mr Hoar's argument lies deeper. It was not Project Logistics' case that there had been a negligent breach of contract, in that advice was sought or impliedly required but was not given or wrongly given. That is a different case all together. And even if I am wrong or being somewhat unfair in this finding, it seems to me that the exemption clause in the Route's standard terms and conditions safeguarded Route against these flaws, and

consequently this case.

[23] I have no problem in finding that the agreement actually was one of manufacture [as between the Appellant and the Respondent], and those terms are the most governing between Route and Project Logistics. And the authorities are rather trite as to the consequences of concluding such an agreement. But the totality of the evidence however reveals that Project Logistics got exactly what it had asked must be designed and manufactured for it. That is to say, it had requested the manufacture of the trailer and the actual question was simply if it got what it paid for. It did. Had the design included a trailing arms height of more than what was built the case would have been different. I have no doubt that Project Logistics experienced intermittent problems with the trailer, but it failed to show that these problems were caused because of any breach of the manufacturing agreement it concluded with Route.

CONCLUSION:

[24] For these reasons I believe the appeal should succeed and I make the following order:

1. The appeal succeeds with costs, such costs to include the costs of two counsel where so employed, on scale C for senior counsel and scale B for junior counsel.

2. The order of the court *a quo* is set aside and substituted with an order as follows:

   2.1 The claim is dismissed with costs, the costs of counsel on scale B and such costs to include the costs occasioned by the prosecution of the application for absolution from the instance.

[redacted]

GROBLER, AJ

I concur.

[redacted]

MBHELE, AJP

I concur.

[redacted]

VAN RHYN, J

On behalf of the Appellant: Adv. N Snellenburg SC
Adv. W. Groenewald
On instruction of:
Symington & de Kok
BLOEMFONTEIN

On behalf of the Respondent: Adv. S. Hoar
On instruction of:
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