



**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG**

Appeal Case no: AR158/2023

In the matter between:

AGVISION CC t/a MMA DEALERSHIP

APPELLANT

and

WINSTON MALCOLM FAYERS

RESPONDENT

JUDGMENT

• **Olsen J (Mathenjwa J concurring)**

[1] In May 2022 the magistrates court at Pinetown granted judgment in favour of Mr Fayers, the plaintiff in that court and the respondent here, against the appellant, AGVision CC for payment of a sum of R23 750, interest thereon, and costs on an attorney and client scale. The defendant (I will refer to the parties as they were in the court below) appeals against that judgment. We have only heard argument from the defendant as the plaintiff abides the decision of this court on appeal.

[2] The plaintiff is a technician who was at the material time employed in Secunda. His home base was Durban, but whilst at work at Secunda he stayed there. The defendant is a motor dealer carrying on business in Pinetown. The plaintiff bought a motor vehicle from the defendant in February 2017. It broke down. The defendant refused to repair it. That led to the plaintiff instituting action in June 2017. The trial only took place about five years later, in 2022. There were only two witnesses, the plaintiff and a Mr Govender, the salesman employed by the defendant who dealt with the transaction.

[3] The particulars of claim called upon the defendant to meet a case based squarely on the provisions of the Consumer Protection Act, 2008. Particular reference was made to section 56 of the Act, and in particular section 56(2) which permits the consumer to return goods to a supplier within 6 months after delivery "if the goods fail to satisfy the requirements and standards contemplated in section 55" of the Act. If that is done the supplier or seller of the goods must "at the direction of the consumer" either

- a) repair the goods; or
- b) replace the goods; or
- c) refund the price.

[4] The prayer at the end of the particulars of claim sought judgment against the defendant for

- "1. Return of the motor vehicle in exchange for refund of the purchase price;
2. Repairs to the motor vehicle at the defendant's cost;
3. Replacement of the vehicle for the equivalent vehicle in working order".

There was no claim for attorney and client costs. The particulars of claim provided no direction from the plaintiff (as consumer) as to which of the remedies he sought, and the prior letter of demand sent by his attorney to the defendant is also devoid of any such direction.

[5] Section 69 of the Consumer Protection Act provides that the consumer may enforce any right in terms of the Act by referring the matter to the Tribunal, or referring it to an ombud, or by applying to a consumer court if there is one with jurisdiction over the matter; or by referring the matter to an alternative dispute resolution agent or filing a complaint with the commission. The last alternative is approaching a court “if all other remedies available to that person in terms of national legislation have been exhausted”. It is plain from the particulars of claim that they spoke to the enforcement of a right in terms of the Consumer Protection Act. With reference to *Joroy 4440 CC v Potgieter N.O.* 2016 (3) SA 465 (FB), *Nzwana v Dukes Motors* [2019] ZAECGHC 81 (3 September 2019) and *Motus Corporation (Pty) Limited v Wentzel* [2021] 3 All SA 98 (SCA), Mr Mizrachi, who appeared for the defendant, has argued that as the plaintiff had neither pleaded nor proved pursuit of his remedy under the Consumer Protection Act through the bodies specifically provided for in the Act for the resolution of such disputes, he had no right to approach the court as “all other remedies available [to the plaintiff] in terms of national legislation” had not been exhausted. That argument is certainly supported by the cases of *Joroy* and *Nzwana*. Whether the line taken in those cases was correct was left open by the Supreme Court of Appeal in *Motus*. As there is a more prosaic route to the decision of this appeal, we find it unnecessary to make a contribution to the debate over the proper construction of s 69 of the Consumer Protection Act.

[6] During February 2017 the defendant had placed an advertisement on the internet offering to sell a fifteen-year-old Jeep Grand Cherokee motor vehicle for R99 950.00. In his evidence the plaintiff said that he thought that the advertised price had been R90 000.00, but was plainly quite uncertain of that. Mr Govender's evidence was clear on the issue and must be preferred. The plaintiff telephoned to make an enquiry about the vehicle and an arrangement was made for him to meet Mr Govender on Friday the 24th of February 2017. He met Mr Govender and, obviously liking what he saw, test drove the vehicle with Mr Govender. The plaintiff decided there and then that he wished to purchase the vehicle but made it clear that he wished to pay for it in cash and take it the next day, Saturday the 25th of February, because he wanted to use it to go back to Secunda.

[7] Mr Govender's evidence was that the vehicle was then "as is" from the perspective of the defendant, that is to say they had bought it on an auction without warranties, and had not yet had an opportunity in particular to see whether it would pass the test necessary in order to obtain a certificate of roadworthiness. If the plaintiff wanted to take the vehicle there and then he would have to attend to the certificate of roadworthiness himself, and the necessary papers were prepared accordingly. Because this was the course to be followed the defendant was allowed a discount of R10 000.00. The agreed price was R89 990.00.

[8] The plaintiff returned on Saturday with that amount in cash and its receipt was acknowledged on the written contract between the parties.

[9] The written contract was put up as an annexure to the particulars of claim. The plaintiff pleaded that a copy of the sale agreement was annexed as annexure 'A'. The defendant admitted that allegation. There was therefore no *lis* between the parties concerning the express provisions of the contract.

[10] The front page of the contract is clearly endorsed as follows.

“Sold as is non-runner car sold “as is””

[11] On the next day, Sunday, the plaintiff left Durban to drive to Secunda. According to him when he had got to Hammersdale (perhaps 40 kilometres or so from Durban) the car stopped and he was unable to restart it. According to the plaintiff he telephoned Mr Govender, whose number he had taken, and was told that there was nothing the defendant could do about it as he (the plaintiff) had “accepted full liability for the vehicle as it is”. He arranged for the vehicle to be towed back to Durban and for his nephew to get the vehicle to a repairer known as Veez Auto Works to take a look at it. He later received a quotation from Veez Auto Works for R23 750.00, which was annexed to the particulars of claim. However there is no prayer for payment of that amount, or for payment of any amount at all in respect of repairs.

[12] According to the plaintiff the quotation from Veez Auto Works was neither accepted nor implemented, save perhaps to the extent that labour to repair the vehicle was performed by that business. Instead the plaintiff's brother sourced the parts necessary to make the repair. I will revert to this topic a little later.

[13] In his evidence the plaintiff claimed that the endorsement on the contract that the vehicle was sold "as is" and as "a non-runner" must have been made after he signed it. A peculiarity of this assertion is that it was made by someone who claims not to have read the contract before or when he signed it. Be that as it may, his evidence to that effect was inadmissible. It was common cause on the pleadings that those words were part of the contract. No attempt was made to amend the pleadings, not always a simple matter when the amendment involves, as it would have in this case, the withdrawal of an admission. It is all very well to say that in the Magistrates' Court pleadings do not require the same attention given to them in the High Court; but that approach cannot be carried too far. Allowing admissions on the pleadings to be undermined by contradictory evidence is a recipe for an unfair trial.

[14] Nothing more need be said on that score, because in my view the magistrate misdirected himself in accepting that the plaintiff's claim was true, with the result that he found that "the entire version of the [defendant] is a fabrication, an afterthought to escape liability."

[15] The plaintiff's version that the crucial words were inserted unbeknown to him after he had signed the document was challenged in cross-examination. He was asked whether he had told his attorney when he handed the contract to him that the words were not there when he signed the contract. He answered in the affirmative. It is undoubtedly improbable that the plaintiff's attorney would have drafted a set of particulars of claim pleading that the contract was the one annexed to the pleadings, without drawing attention to his client's contention that the words in questions were not on the document when he signed it. Indeed, the fact that the attorney's instructions

did not coincide with the claim made by the plaintiff is also apparent from a strange paragraph in the particulars of claim which follows immediately upon the one which pleads the contract. It reads as follows.

“The vehicle was in working order.”

On the face of it that paragraph may be described as perverse, given that the plaintiff's case was that whilst he believed the vehicle to be in working order, unbeknown to him it was not. I think it quite clear that what the attorney sought to achieve in that paragraph was to highlight the contradiction between the apparent working order of the vehicle and the fact that in terms of the contract it had been sold as a “non-runner”.

[16] The magistrate ought to have concluded that the plaintiff was not telling the truth when he said that he had instructed his attorney that the words in question were inserted after he had signed the document. That would lead inevitably to the conclusion that the plaintiff's evidence could not be relied upon to establish his claim that the words were inserted later.

[17] As to why a motor dealer would sell a vehicle on the basis that it is to be regarded as a “non-runner” when it is capable of being test driven, I think the answer lies in the provisions of section 55 of the Consumer Protection Act. Section 55(2) of the Act provides that, except to the extent contemplated in subsection (6), every consumer has a right to receive goods that are reasonably suitable for the purposes for which they are generally intended, are of good quality and are in good working order and free of any defects. It is also provided that a consumer has a right to receive goods which will be useable and durable for a reasonable period of time, but that right is subject “to all the surrounding circumstances of their supply”. In times gone by the

words “as is” or “voetstoets” would have been sufficient to exclude the common law warranty against latent defects. (At common law liability would not generally arise from the presence of patent defects.) However section 55(5) is to the effect that it is irrelevant whether a product failure or defects were latent or patent. Section 55(6), the one to which subsection 55(2) is subject, is to the effect that the rights in s 55(2)(a) and (b) do not apply to a transaction if the consumer

- “(a) has been expressly informed that particular goods were offered in a specific condition; and
- (b) has expressly agreed to accept the goods in that condition, or knowingly acted in a manner consistent with accepting the goods in that condition”.

[18] In my view the words endorsed on the contract, and now repudiated by the plaintiff, meet the test set by section 55(6) of the Consumer Protection Act; and indeed, that was pleaded in the defendant’s plea. If a purchaser is willing to buy a motor vehicle as a “non-runner”, despite the fact that it can be driven and indeed tested, the consumer accepts that he or she can expect no more of the vehicle than would be the case if it was not running at all. On the face of it such a purchase would be unwise, but the purchaser’s judgment on that issue would depend on the price being asked, and perhaps also the consumer’s belief as to his or her capacity to deal with the problem if something went wrong.

[19] I think it fair to say that the plaintiff’s attempts to bolster his denial of the fact the crucial words were not in the contract when he signed it amount to this.

- (a) The manager said that one could drive the car to Cape Town. Why would I buy it as a non-runner if he said that.

(b) I tested the car successfully. Why would I buy it as a non-runner?

Implicit in those arguments, and indeed in the evidence of the plaintiff throughout, is the fact that he knew what it would mean to buy a car as a “non-runner” even though it was capable of being driven and tested.

[20] The magistrate did not grant any of the relief sought under the provisions of the Consumer Protection Act. He appears to have approached the matter upon the basis that the common law warranty against latent defects was in place under the contract and awarded contractual damages on the footing that the vehicles engine suffered from a latent defect.

[21] The plaintiff confessed that he knew nothing about motor vehicles and was not able to speak personally to what caused the vehicle to stop at Hammersdale, and not restart. He relied upon information given to him by others. The plaintiff said that it eventually cost him R35 000 to fix the car. His brother had sourced the parts but he did not know how much his brother paid for them. No invoices were presented and no explanation for the absence of them given. No explanation was given as to why his brother was not called. No reason was given as to why the mechanic who diagnosed the alleged problem, and fixed it, was not called. Even if the claim which the magistrate seems to have allowed had been pleaded, the defendant would have been in the impossible position of being denied the right to interrogate, and contradict, if that were appropriate, the proposition that there was something wrong with the engine, and the quantification of the claim for its repair. It must be assumed in the circumstances just mentioned that the witnesses and the evidence were available to the plaintiff. As to quantum, the case concerned patrimonial loss capable of precise quantification. The

failure of a plaintiff to produce the available evidence in such a case does not license the award of an unproven arbitrary amount.

[22] The magistrate simply took the figure he used when granting judgment from a quotation which he knew, on the evidence, had not actually been accepted or employed.

[23] The following order is made.

- a) The appeal is upheld with costs.
- b) The magistrate's order is set aside and substituted with the following:
"The plaintiff's claim is dismissed with costs".


Olsen J


Mathenjwa J

Case Information:

Judgment reserved:
Judgment delivered:

14 February 2025
28 March 2025

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