



**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, MAKHANDA)**

CASE NO. CA 49/2024

In the matter between:

EASTERN CAPE MOTORS (PTY) LTD

APPELLANT

and

CORNELIUS JOHANNES WOLMERANS

RESPONDENT

JUDGMENT ON APPEAL

Rugunanan J

[1] This appeal emanates from proceedings in the Magistrates' Court, East London and is against the whole judgment and order handed down on 5 February 2024 dismissing the appellant's claim (as plaintiff) against the respondent (as

defendant). The appeal is advanced on several grounds. In the aggregate it is asserted that in dismissing the appellant's claim with costs on the attorney and client scale the trial court erred in fact and in law. Pertinently, the appellant complains that the trial court misdirected itself in its assessment of the evidence and in failing to accord proper consideration of established principles in contract law. Furthermore, the resultant costs order was manifest of an improper exercise of judicial discretion for which, it was contended, no factual foundation existed.

[2] There are numerous instances in the transcript of the trial proceedings where the tag 'intervenes' is observed. The transcriber's certificate certifies the proceedings 'in as far as it is audible'. The transcriber proffers the reason: 'Parties constantly interrupted each other making it hard to follow what was being said at times'. In the course of prosecuting the appeal the record was served on the respondent's local attorneys. Although the appeal is unopposed, the issue was raised with counsel for the appellant. He opined that the matter is capable of adjudication and submitted that the issues raised in the appeal are narrowly confined to established principles in the law of contract, necessitating that the appeal only be decided on the main cause of action. We agree. In that regard the appeal does not necessarily require consideration of the entire record of the proceedings but merely such part/s thereof as may be required to enable the Court to properly consider the particular issues on appeal in the context of the trial proceedings.¹

[3] The appellant is a private juristic entity. It trades as a dealership in the sale of new and pre-owned motor vehicles. The respondent is a retired police officer. On 14 March 2022 the respondent signed a written agreement in terms of which he purchased from the plaintiff a pre-owned Toyota 'Ayga' 1.0 A/T motor vehicle vended at R200 739.95 inclusive of VAT for a simultaneous trade-in of his Mitsubishi Pajero 3.2 DID GLS which the appellant valued at R140 000 as a 2013

¹ *S v Zondi* 2003 (2) SACR 227 (W) para 9.

year model. The valuation amount served as a deposit for the acquisition of the Toyota. The balance of the purchase price on the Toyota was financed. On 25 March 2022, subsequent to the respondent having taken delivery of the Toyota, the appellant discovered that the Mitsubishi was in fact a 2005 model with a value of R80 000. The evidence indicates that there is no physical difference in the bodywork and engine type between a 2013 and a 2005 year model that would otherwise have been immediately apparent to the representatives of the appellant who dealt with the respondent. The appellant claimed damages for the amount of R60 000 calculated on the difference between R140 000 and the reduced trade-in value of R80 000.

[4] On the pleadings the contract between the parties is an amalgamation of a document identified as a 'Vehicle Order' and a further item entitled 'Special Conditions of Offer to Purchase'. In its combined summons the cause of action principally relied on by the appellant is founded in the law of contract.

[5] The cause is formulated as a breach of warranty by the respondent who represented the Mitsubishi as a 2013 year model for which the appellant tendered R140 000 for its trade-in. The evidence indicates that the representation was made verbally and in writing when the respondent signed the contract. Upon discovery that the vehicle was a 2005 model the appellant suffered loss for the amount claimed. The appellant pleaded that the respondent breached the warranty provisions set out in clauses 12.4 and 12.6 of the contract.

[6] Referring to the respondent as the purchaser, clause 12 reads:

'12. I warrant that:

12.1 The trade-in vehicle referred to in this agreement is my sole property.

...

12.4 The date of first registration and the odometer reading of the trade-in is correct;

...

12.6 Your valuation is based on this warranty.'

[7] Parenthetically, the respondent acknowledged that the trade-in vehicle mentioned in the abovementioned clause was a reference to the Mitsubishi.

[8] In the alternative, the appellant relied on a reckless and careless misrepresentation that induced it to accept the Mitsubishi as a trade-in.

[9] On the quantum issue, the appellant calculated the amount claimed in damages by recourse to clause 13 of the contract in which it is declared by the respondent:

'I acknowledge that you shall have the right in your discretion either to cancel the contract or reduce the value of the trade-in, if in your sole and absolute opinion the vehicle traded in is not in the same condition mechanically or otherwise as when valued by you or if it is established that the date of first registration has been incorrectly represented by me, or the odometer reading is incorrect, or the vehicle has been involved in an accident.'

[10] In his plea the respondent only admitted having concluded the contract and that he traded-in the Mitsubishi and agreed to purchase the Toyota for the amount of R200 739.95. Save for these admissions the balance of allegations including those related to the specifically pleaded terms of the contract were baldly denied, putting the appellant to the proof thereof.

[11] The judgment of the trial court evinces indications that the magistrate was influenced by the appellant's past experience of numerous instances with trade-in clients who proffered incorrect information on the year model of their vehicles – and more tellingly, by the absence of evidence by the appellant that concrete or precautionary steps were taken to verify the information supplied by clients before concluding agreements with them.

[12] In dismissing the action, the judgment demonstrates that the matter was adjudicated on the footing that the appellant 'used unfair tactics in the conclusion of the agreement' and that its sales representative, Mr Kent Venish, was remiss in failing to take steps to verify the year model of the Mitsubishi 'after so much legislation was passed to protect the interests of the consumer'. Mr Venish strenuously resisted the imputation of a failure to take steps, in particular during cross-examination when it was put to him that he was negligent. The judgment indicates that the matter was not adjudicated with regard to the pleaded cause of action, namely the breach of warranty. It appears rather that the magistrate made his own factual findings which he believed substantiated the respondent's pleaded bald denials. The evidence offers no express indication, nor does it suggest by inference that there was a ploy by the appellant to induce the conclusion of the contract to prejudice the interests of the respondent.

[13] The approach adopted by the trial court is disquieting considering that the respondent did not plead an affirmative defence with reference to any material facts attributing negligence to Mr Venish, specifically his failure to take steps. Nor did the respondent formulate his defence to indicate reliance on consumer protection legislation. Had they been pleaded, these are matters that might reasonably have led to an anticipation that they would be an issue in the trial to be fully canvassed in evidence by both sides in the sense that the trial court was expected to pronounce upon them.²

[14] The importance of pleadings is trite. They define the issues for the other party and for the court. The primary function of a judicial officer is to hear evidence in terms of the pleadings, to hear argument and to give a decision

² Compare *South British Insurance Company Limited v Unicorn Shipping (Pty) Limited* 1976 (1) SA 708 (A) at 714G where Holmes JA considered when it would be competent for a court to pronounce upon matters not raised in pleadings. He stated as follows: 'However, the absence of such an averment in the pleadings would not necessarily be fatal if the point was fully canvassed in evidence. this means fully canvassed by both sides in the sense that the court was expected to pronounce upon it as an issue.'

accordingly.³ Except where a court of its own accord raises a question of law that emerges fully from the evidence and which is necessary for the decision of the court, it is incumbent on a court to adjudicate the issues identified by the parties in their pleadings.⁴ Holding parties to their pleadings is not pedantry – it is integral to the achievement of legal certainty which is central to the constitutional prescript of the rule of law.⁵ It is impermissible for a court, when deciding a case, to have recourse to issues not specifically pleaded by a party and which are extraneous to the pleadings.⁶

[15] The adjudication of the matter on material that had not been foreshadowed in the defendant's plea and without proper consideration of the issues underlying the appellant's cause of action was a misdirection which entitles interference on appeal.

[16] The misapprehension of the purpose served by pleadings is also evident from the conduct of the respondent's case in the trial court. Cross-examination of the appellant's witnesses was protracted. In some instances it went beyond the scope of the issues in the pleadings and had no relevance at all – an example of which occurred when an attempt was made to have Mr Venish comment on the Mitsubishi being insured as a 2004 year model by the respondent's insurers. In other instances, cross-examination was repetitive obliging the trial magistrate to correctly call the cross-examiner to attention and to utter: 'I am trying to ask for progress'. In another instance, a witness for the appellant, Mr Gordon Gobbi, a valuator, who testified on his evaluation of the Mitsubishi felt obliged to say after repeatedly being questioned about information loaded onto an online dealership

³ *WHB v Road Accident Fund* [2024] ZAGPPHC 583 para 42 and the reference to *Imprefed (Pty) Ltd v National Transport Co* 1993 (3) SA 94 (A) at 107G-H.

⁴ *Molusi and Others v Voges* 2016 (7) BCLR 839 (CC) para 28

⁵ *South African Transport and Allied Workers Union and another v Garvas and others* 2013 (1) SA 83 (CC) para 114.

⁶ *Minister of Safety and Security v Slabbert* [2010] 2 All SA 474 (SCA) para 11. See also *Jowell v Bramwell-Jones and Others* 1998 (1) SA 836 (WLD) at 898F-J.

platform: 'I have explained to you three times, Sir'. In all instances, the result was a significantly inflated record that in no way contributed to or advanced the efficiency of the proceedings.

[17] There is however, something that must be said about the attitude of the cross-examiner which emerged in the following exchange with Mr Christopher Theodosiou, a director of the appellant:

Mr [CT]:	Please do not point at me.
Mr [VH]:	Well, I am asking ... [intervenes]
Mr [CT]:	I take offence to being pointed.
Mr [VH]:	Okay that is fine.
Mr [CT]:	Anybody would be offended if they were pointed at. If you do not mind.
	Okay.
Mr [VH]:	I was pointing at your body not at your face.
	...
COURT:	Okay, let us – but it does not matter [indistinct].
Mr [CT]:	It is quite rude.'

[18] It is in the lower courts that the majority of members of the public usually have their initial experience of the justice system. Undeniably, public confidence in the justice system is to a large extent moulded by their perceptions of how they are treated by *inter alia* judicial officers, practitioners, and administrative assistants. Despite the adversarial atmosphere that often permeates the courtroom, it is salutary to sound a reminder that witnesses should be treated with civility and respect⁷. Judicial officers should not be hesitant to be outspoken in their condemnation of conduct that transgresses these attributes.

⁷ Code of Conduct for all Legal Practitioners published in GG No. 42364, 29 March 2019 under the Legal Practitioners Act 28 of 2014 <https://lpc.org.za/wp-content/uploads/2020/10/CODE-OF-CONDUCT.pdf> accessed 8 March 2025.

[19] To sum up, the role of presiding officers permits them to control cross-examination promptly. In the process they are not only expected to balance the rights of the litigating parties but to avoid the exploitation of a witness by ensuring that the witness' inherent dignity and moral worth are respected.⁸

[20] Focus shifts to the merits of the appeal. For the appellant, the evidence led during trial comprised of the testimony of Mr Venish, Mr Gobbi, and Mr Theodosiou. The respondent testified on his own behalf. The trial court accepted the version of the respondent and dismissed the appellant's claim.

[21] Except for evidential matter considered necessary to inform the conclusion in this judgment it is not intended to recapitulate in full the evidence of each of the appellant's witnesses in the sequence that they testified. No judgment can ever be all embracing and it does not necessarily follow that because something has not been mentioned it has not been considered⁹.

[22] A leading feature in the evidence of the appellant's witnesses is that the appellant's approach to business is client-centric. This accentuates satisfying a client's needs for cultivating a positive experience based on trust and the recognition of individual worth.

[23] Reading Mr Theodosiou's testimony distinctly conveys that trust, as an attribute on its own, does not supplant contractual privity. In point, the Supreme Court of Appeal in *Capitec*¹⁰ observed that 'good faith and fairness are not substantive, free standing principles to which direct recourse may be had so as to interfere with contractual bargains or decline to enforce contracts'.¹¹ In our view, while trust may well be

⁸ See the informative article by Professor Arthur van Coller titled '*Chetty v Perumaul* [2021] ZAKZPHC 66 – A cautionary note on the self-inflicted injury of disastrous and careless cross-examination' (2023) De Jure Law Journal 436 <https://www.saflii.org/za/journals/DEJURE/2023/25.pdf> accessed 8 March 2025.

⁹ *R v Dhlumayo* 1948 (2) SA 677 (A).

¹⁰ *Capitec Bank Holdings Limited and Another v Coral Lagoon Investments 194 (Pty) Ltd and Others* 2022 (1) SA 100 (SCA) para 63.

¹¹ See also *Barkhuizen v Napier* 2007 (5) SA 323 (CC) paras 80-82.

included amongst the nomenclature associated with good faith and fairness, Mr Theodosiou correctly posits that it is to the contract to which one must ultimately have recourse.

[24] Commenting on Mr Venish, Mr Theodosiou regarded him to be a highly competent salesperson who went out of his way to be of service to a client. Mr Theodosiou readily acknowledged instances in years gone by when clients proffered incorrect information on their trade-ins. The outcome had often been a solution with options that occasioned either a reversal of the transaction or a revaluation of the trade-in. When all else fails – as in this case – recourse must ultimately be had to enforcing the contract. The appellant became obliged to do so when the respondent did not react to similar options that were proposed in a letter of demand.¹²

[25] On 9 March 2022 Mr Gobbi interacted with the respondent. Mr Venish completed a ‘Used Vehicle Valuation and Appraisal’ (the valuation document) that was handed over to Mr Gobbi for a trade-in valuation of the respondent’s Mitsubishi. The evidence indicates that the valuation was completed on the same day in the presence of the respondent.

[26] Mr Gobbi was unequivocal that the valuation document received from Mr Venish presented the respondent’s vehicle as a 2013 year model with a recorded mileage of 304 000 kilometres. He stated that it was not necessary to have the registration papers of the vehicle available at the relevant time. Upon it being put to him that both he and Mr Venish were negligent in failing to establish

¹² Quoted in relevant part, they read: ‘Two options were put to you: - to have the transaction cancelled and to have the Toyota Aygo returned to Eastern Cape Motors and for you to take back the Mitsubishi Pajero 3.2DID GLS (that is in exactly the same condition and state it was at the time of exchange with the same kilometre reading as the vehicle has been placed in storage) without there being any financial outlay; - or for the transaction to be recalculated taking into account the reduced value of the Mitsubishi Pajero 3.2DID GLS considering the 2005 date and ageing of the vehicle.’

the correct year model of the Mitsubishi prior to its valuation, he conceded that it was possible.

[27] In our view, the concession is meaningless. Without Mr Gobbi himself having testified that there was a duty on him to have verified the year model of the Mitsubishi before evaluating it, or an acknowledgment to that effect, it was impermissible to have imputed negligence to him. Furthermore, in cross-examination, Mr Venish admitted that the certificate of registration was required for a valuation of the vehicle. He was pressed to concede that Mr Gobbi ought to have had the certificate of registration prior to valuating the Mitsubishi. He refuted this by stating: 'I cannot speak for the valuator, Sir. ... He would not ask for that documentation (sic) because I gave it to him out of the valuation book as I got it from the client Mr Wolmerans'. In addition, and for reasons previously mentioned, negligence was not specifically pleaded by the respondent as an issue for canvassing in evidence by both parties and for the trial court to pronounce upon.¹³ Moreover, the probabilities must be viewed from the perspective that Mr Gobbi and the respondent are personally known to each other, having been neighbours at some stage. This is a significant factor in the matrix of circumstances that bear upon the appellant's trust-oriented and client-centric approach with recognition accorded to the respondent's status as a retired police officer.

[28] Mr Gobbi evaluated the Mitsubishi on the basis of the information directly given by the respondent to Mr Venish. Where trade-ins have been evaluated on that basis it had occurred at times that registration papers were forthcoming only once the client had taken delivery of the other vehicle. Mr Gobbi was not particularly concerned about the mileage of the Mitsubishi (nor was Mr Venish).

¹³ Compare *South British Insurance Company Limited v Unicorn Shipping (Pty) Limited* 1976 (1) SA 708 (A) at 714G where Holmes JA considered when it would be competent for a court to pronounce upon matters not raised in pleadings. He stated as follows: 'However, the absence of such an averment in the pleadings would not necessarily be fatal if the point was fully canvassed in evidence. This means fully canvassed by both sides in the sense that the court was expected to pronounce upon it as an issue.'

He considered it to be average and ascribed a value of R140 000 to the vehicle by conducting a physical inspection and by accessing information on a database known as Dealers Online. The ascribed value was for a 2013 vehicle and although the value would differ for a 2005 year model, he stated that there is barely a discernible physical difference between these year models (this was also confirmed by Mr Venish). However, an older vehicle such as 2005 year model would preferably be vended online for bidding by various dealers with access to the dealers' online database.

[29] Mr Venish was instrumental in the conclusion of the contract between the appellant and the respondent. He confirmed that the trade-in amount for the Mitsubishi and its year model represented by the respondent as 2013 were amongst other items of information incorporated in the contract. It is common cause that the respondent approached the appellant's dealership on 9 March 2022 to present the Mitsubishi as a trade-in for a more economical vehicle. The meeting between the respondent and Mr Venish was preceded earlier that day by a telephonic engagement when Mr Venish mentioned the Toyota while the respondent proposed the Mitsubishi potentially as a trade-in. Following the discussion, Mr Venish stated that he sent the respondent a message via WhatsApp requesting pictures of the Mitsubishi including its year model and registration details. The message elicited no response but later that day the respondent arrived at the appellant's dealership to discuss the Toyota and to present the Mitsubishi.

[30] Mr Venish completed the valuation document in the presence of the respondent. He maintained that the respondent warranted the Mitsubishi to have been a 2013 year model but could not recall if the respondent had told him that he (i.e. the respondent) was unsure thereof. On completion of the document with information such as the colour and registration number of the vehicle, the document was handed to Mr Gobbi.

[31] It is not in dispute that on conclusion of the contract on 14 March 2022, the trade-in was effected and the respondent took delivery of the Toyota. According to Mr Venish, when the respondent arrived that day, he was in a 'pretty mad rush' and handed over a sealed white envelope in which the certificate of registration of the Mitsubishi was enclosed. The respondent's version is that Mr Venish retrieved the registration certificate from the envelope, looked at it and placed it back into the envelope, at the same time emphasising its importance. Mr Venish did not deny having said to the respondent that the certificate is an important document. The evidence indicates that Mr Venish did not wish to hinder the respondent. In the sales environment, Mr Venish emphasised the importance of building a relationship with a client. The respondent's good standing contributed to a seamless approval a few days earlier of his in-house application for financing the acquisition of the Toyota. And seemingly with this in mind while aware of the respondent's haste, Mr Venish did not wish to spoil his rapport with the respondent and wanted to ensure an easy delivery of the Toyota. Although acknowledging the significance of the certificate of registration, Mr Venish maintained that he was under pressure and conceded that he did not immediately peruse it. On being asked about this he responded: 'I was caught up with the delivery of the Toyota ... I wanted to make sure everything was right with that car so I took the envelope, I accepted it, trusted [the respondent] in good faith and I stuck it in my deal file'.

[32] Once the file went through to the appellant's administration department it later emerged from the certificate of registration that the correct year model of the Mitsubishi was in fact 2005 which affected the trade-in value of the vehicle (and the eventual amount payable by the respondent as the balance of the purchase price for the Toyota¹⁴).

¹⁴ Which amounted to R60 739.95 representing the difference in the purchase price of R200 739.95 and the trade-in on the Mitsubishi for R140 000.

[33] Reflecting on the respondent's version, there are significant aspects that were traversed with leading questions to which objection had properly been taken and to which the magistrate appositely remarked: 'I agree ... My fear is there is going to be a very big misunderstanding when he is supposed to tell the story by himself'.

[34] To a large extent the respondent overtly attempted to distance himself from the contract by maintaining that he signed it without reading it. The financing of the Toyota did not happen a few days earlier but was arranged on the day that he took delivery of the Toyota. As for the circumstances attendant at the time, he insinuated that he did not apply his mind. While testifying, he attempted to reconstruct a swift atmosphere of the circumstances suggesting that the finance lady 'read and mumbled a lot of stuff'; that everything was done by computer and that he was blitzed by one time pin (OTP) numbers after which he signed off on a digital keypad. It was correctly put to him in cross-examination that the version of not having read the contract arose for the first time during trial and was never pleaded. In our view this version must be approached with circumspection.

[35] Testifying in chief, the respondent confirmed having told Mr Venish that the Mitsubishi was a 2013 year model but maintained that he was uncertain thereof. In his words: 'I assumed it was a 2013 model. Why I said it I really – up until now I do not know'. ... The licence disc actually says it is a 2013 model and that is what confused me most probably.' He agreed that the licence disc in respect of the Mitsubishi referred to the date of the roadworthy test as 27 November 2013 which is not suggestive of the year model of the vehicle.

[36] In so far as the Mitsubishi was registered with his own insurers as a 2004 year model, his explanation was that his insurance brokers were requested to contact Mr Venish. To what end were they required to do so is not entirely clear but this was not taken up with Mr Venish in cross-examination.

[37] Regarding the R140 000 valuation of the Mitsubishi, he stated that this was conveyed via WhatsApp by Mr Venish on the day after their first meeting. Only then did he convey to Mr Venish that he was happy to go ahead with the acquisition of the Toyota on the trade-in value ascribed to the Mitsubishi. Once the offer of R140 000 was communicated and accepted, he considered from that point onwards that the Mitsubishi belonged to the appellant. By implication, the respondent believed his association with that vehicle had been rescinded and all that was required of him was to surrender the certificate of registration so that the vehicle be deregistered from his name.

[38] On receiving the letter of demand, he was shocked. It was the first time he realised that the Mitsubishi was not a 2013 year model. He felt threatened by its contents. When asked about whether he engaged with the appellant after receiving the letter he gave a mixed response – on the one hand, to the effect that he thought that there was a conversation with the author of the letter – while on the other hand, he said that he worked out of town and that none of the appellant's staff requested a meeting to discuss the matter.

[39] It is perhaps convenient at this point to reveal a few aspects of Mr Venish's uncontradicted evidence. It unfolded when he testified about the relevance of the certificate of registration and vehicle licence disc that were introduced as trial exhibits.

Mr Kemp: Okay when you talk about a year model ... what does it mean?

Mr Venish: That is ... when the vehicle is first registered so if we talk about the year model it is the first registration of the vehicle ... when [the] car gets first registered as a new vehicle that is the year reg [sic] or the year model.

...

Mr Kemp: All right. What is this document?

...

Mr Venish: This is a licence disc of a vehicle and being in the trade or the business there has been a lot of clients who will look at the vehicle and they will think that this is the registration of the vehicle. This is not the first registration of the vehicle, this is the licence disc of the vehicle, the first registration would be on the registration document. So if you look on this vehicle where it says date of test 27/11/2013 that is actually not the regist (sic) –first day of registration, that is possibly a roadworthy test where the vehicle might have been resold or sold again ...

[40] Under cross-examination the following concessions were made by the respondent:

Mr Kemp: [W]hen signing this ... you genuinely you said you were convinced it was a 2013 model.

Mr Wolmerans: That is right.

...

Mr Kemp: I think we can agree on ... to summarise is that at this particular point in time you genuinely believed it was a 2013 model, and when you signed the agreement, you genuinely believed it was a 2013 model.

Mr Wolmerans: That is correct, that is correct.

...

Mr Kemp: I think we have already covered it that this contract is based on a price given for a Pajero that everyone thought was a 2013 model. Do you agree?

Mr Wolmerans: Yes. ...

...

Mr Kemp: [I]t must surely be common sense that a 2005 car will be of a lower value compared to a 2013 car.

Mr Wolmerans: That is correct. ...

...

Mr Kemp: You genuinely believed it was a 2013 model and you held it out to be a 2013 model.

Mr Wolmerans: Yes. Yes. Up until I found out that it was not.'

[41] It is clear from the evidence that the respondent conceded having signed the contract. The *caveat subscriptor* rule is to the effect that generally a party who signs a document containing contractual terms is bound by their signature whether they read the document or not¹⁵. It boils down to whether the party who signed the contract created the impression for the other party that he or she had agreed to the terms contained in the document¹⁶. It was never the respondent's case that he was hesitant to sign the contract and/or that such hesitancy shone through in his interaction with the appellant's representative, and for that reason he should be absolved from the precept *caveat subscriptor*.

[42] Significantly, the respondent told Mr Venish that the Mitsubishi was a 2013 year model. Evidently, the respondent consistently maintained this position in cross-examination and distinctly conceded that he was 'convinced' and 'genuinely believed it to be a 2013 model and held it out to be a 2013 model'. The evidence leaves no scope for finding that his uncertainty regarding the year model of the vehicle is credible. There are palpable indications that the respondent warranted the vehicle to have been a 2013 model and that he was not subjected to any form of coercion when he concluded the contract with the appellant.

[43] A warranty is a contractual statement of fact by one party to another, asserting that a specific state of affairs is true. It is used in the present context to mean a term of the written agreement¹⁷. Recapitulating the submission in the

¹⁵ *Afrox Healthcare Bpk v Strydom* 2002 (6) SA 21 (SCA) para 34.

¹⁶ *George v Fairmead (Pty) Ltd* 1958 (2) SA 465 (a) at 471B-D.

¹⁷ *Eastern Cape Motors (Pty) Ltd v Stu Davidson and Sons (Pty) Ltd* [2016] ZAECGHC 109 para 11. The judgement was affirmed on appeal to the SCA in *Stu Davidson v Eastern Cape Motors (Pty) Ltd* [2018] ZASCA 26 when the appeal court struck the appeal from the roll with costs for lack of prospects of success.

appellant's heads of argument, it was not the respondent's pleaded case that he should not be bound by the terms of his contract, and there is no reason not to hold him to its terms.

[44] Our courts have consistently held that contracts freely and voluntarily entered into between parties must be honoured. Put otherwise, parties are required to observe such terms as they previously agreed upon. This is expressed by the maxim *pacta sunt servanda*, the relevance of which was endorsed by the Constitutional Court in *Beadica*¹⁸ in which the majority stated the following (footnotes omitted):

'The first is the principle that "[p]ublic policy demands that contracts freely and consciously entered into must be honoured". This Court has emphasised that the principle of *pacta sunt servanda* gives effect to the "central constitutional values of freedom and dignity". It has further recognised that *in general* public policy requires that contracting parties honour obligations that have been freely and voluntarily undertaken. *Pacta sunt servanda* is thus not a relic of our pre-constitutional common law. It continues to play a crucial role in the judicial control of contracts through the instrument of public policy, as it gives expression to central constitutional values.

Moreover, contractual relations are the bedrock of economic activity and our economic development is dependent, to a large extent, on the willingness of parties to enter into contractual relationships. If parties are confident that contracts that they enter into will be upheld, then they will be incentivised to contract with other parties for their mutual gain. Without this confidence, the very motivation for social coordination is diminished. It is indeed crucial to economic development that individuals should be able to trust that all contracting parties will be bound by obligations willingly assumed.'

¹⁸ *Beadica 231 CC and Others v Trustees for the time being of the Oregon Trust and Others* [2020] ZACC 13 paras 83-84; 2020 (5) SA 247 (CC) paras 83-84.

[45] For all the above reasons the appeal must be upheld. It is unnecessary to delve further into the merits of the appellant's alternatively pleaded cause of action.

[46] The only outstanding issue relates to costs. In terms of clause 18 of the contract the respondent agreed to be liable for all legal costs as between attorney and own client following any breach by him. The agreement made no provision for a costs outcome in the event of a breach by the appellant. That notwithstanding, the trial court made a punitive costs order against the appellant without motivation therefor. Furthermore, the order was not foreshadowed in the prayer to the respondent's plea. Indubitably, the costs order ensued due to a failure by the trial court to exercise its discretion judicially.

[47] As for the costs of the appeal, it was contended for the appellant that same be ordered on the contractually agreed scale. We do not agree. The respondent did not oppose the appeal. Whether he did so on legal advice or had taken a personal decision to do so, is unknown. The fact of the matter is that he has not been heard on the issue.

[48] In the result the following order is made:

1. The appeal is upheld and the respondent is ordered to pay the costs of the appeal on a party and party scale.
2. The order of the trial court is set aside and substituted to read:

‘Judgment is granted in favour of the plaintiff against the defendant for:

- (a) Payment of the amount of R60 000 (sixty thousand Rand).

- (b) Interest on the said amount at the legal rate applicable from time to time calculated from 5 February 2024 to date of final payment.
- (c) Costs of suit on a scale as between attorney and own client.'




M. S. RUGUNANAN
JUDGE OF THE HIGH COURT

I agree.




N. P. MNQANDI
ACTING JUDGE OF
THE HIGH COURT

Appearances:

For the Appellant: *G J Gajjar*, Instructed by Pagdens Attorneys, Gqeberha
(Ref: M Kemp; Tel: 041-502 7200 Email: michelle@pagdens.co.za) c/o
Netteltons Attorneys, Makhanda (Ref: I Pienaar; Tel 046-622 7149; Email:
sam@netteltons.co.za).

For the Respondent: No appearance.

Date heard: 07 March 2025.

Date delivered: 15 April 2025.