




IN THE NORTH GAUTENG HIGH COURT, PRETORIA

(REPUBLIC OF SOUTH AFRICA)

8/11/2012

CASE NO: 15090/11

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES /NO
(3)	REVISED.
8/11/2012	
DATE	SIGNATURE

In the matter between:

FIRSTRAND BANK LIMITED

PLAINTIFF

and

JAN ANDRIES MALAN

DEFENDANT

J U D G M E N T

LEDWABA, J:

- [1] The plaintiff and the defendant entered into a written instalment sale agreement (the agreement) on 24 September 2008 involving a Cadillac vehicle which was delivered to the defendant. Due to some misunderstanding

or misrepresentation between the defendant and the dealer regarding the type of vehicle which was the subject of the agreement, on 17 December 2008 plaintiff and defendant entered into a Substitution of Goods Addendum to the aforesaid agreement in terms whereof a 2008 Cadillac STS 4.6 V8 (the vehicle) was delivered to the defendant to substituted the V6 Cadillac CTS which was initially delivered to the defendant.

- [2] Evidence was presented as to what transpired before the agreement was entered into and also as to what led to the Substitution of Goods agreement to be entered into. In my view, it is not necessary to deal and/or mention the said evidence because I do not think it is relevant for the purpose of the issue(s) to be determined in *casu*.
- [3] The plaintiff is claiming payment of the agreed amount of R424 078, 24 being damages suffered as a result of the defendant's repudiation of the agreement. after the vehicle was sold at an auction in November /December 2010.
- [4] The defendant filed a counterclaim wherein he is claiming an amount of R124 550, 61 for the latent defects on the vehicle.

- [5] The defendant's defence to the plaintiff's claim is based on the *actio redhibitoria*. I will deal with the defendant's defence and counterclaim later in this judgment.
- [6] At the commencement of the trial the parties' legal representatives agreed that it could be recorded that in the event that the defendant fails to prove that the vehicle had latent defect (s) when it was delivered, he would be liable to pay the plaintiff the amount claimed,. Should the defendant prove the existence of the latent defect, in terms of the common law (*actio redhibitoria*) he would be entitled to the amount claimed in the counterclaim and the plaintiff's claim should fail.
- [7] The important issue to be discussed is whether the vehicle had latent defect (s). The parties further agreed that the defendant bears the onus of proving same on the balance of probabilities.
- [8] Importantly, for the defendant to succeed with *actio redhibitoria* he must allege and prove that:
- 8.1 the object sold has a defect, which viewed objectively, substantially impaired the object's utility or effectiveness, for the purpose for which it was sold or for which it is commonly used;
 - 8.2 the defect existed at the time of sale;

8.3 the defect was latent, in other words it was not visible or discoverable upon inspection;

8.4 the purchaser was unaware of the defect;

8.5 objectively speaking, the purchaser would not have purchased the object had he known of the defect;

8.6 the purchaser is willing and able to effect restitution or there are sufficient grounds for excusing restitution.

(See Amler's Precedents of Pleadings, 7th edition by LTC Harms on page 250)

[9] About five witnesses testified to support the plaintiff's case before plaintiff's case was closed. The defendant testified and closed his case without calling any witness.

[10] I will commence with the summary of the defendant's evidence presented to support his defence; in particular that there were some latent defect (s) on the vehicle.

[11] He said after the vehicle was delivered to him on 17 December 2008, he wanted to drive to Cape Town the next day but when he started the vehicle it did not start at all.

- [12] He contacted the dealer who delivered the vehicle to him and the dealer arranged a mechanic to start the vehicle. Thereafter he took it to a local dealer who fitted a tracker system.
- [13] After the tracker was fitted the vehicle could not start again. The tracker dealer boosted its battery with cables connected to the battery of another vehicle.
- [14] As advised, he went to a Cadillac motor vehicle dealer in Klerksdorp who charged the vehicle's battery for about two hours. Thereafter he drove to Cape Town without switching off the vehicle until he reached his destination.
- [15] After arriving in Cape Town, he started the vehicle in the morning and drove to a shopping mall called Ratanga Junction. When he returned to the vehicle after about five to six hours, the vehicle could not start.
- [16] The vehicle battery was boosted again with the cables. He then drove back to Potchefstroom without switching it off.

- [17] He then reported the vehicle's problem to the plaintiff. The dealer's mechanics checked the vehicle and took it to the repairs station. They kept it for two weeks and a new stronger battery was fitted to the vehicle.
- [18] About two weeks thereafter he went to Cape Town for a week and left the vehicle at his house in Potchefstroom. After returning from Cape Town when he switched on the ignition there was no light on the vehicle, the words that the defendant used are that '*the car was dead*'.
- [19] He complained to Mr Morne Schutte about the problems he was experiencing with the vehicle. He further lodged a complain with the head office of General Motors in Port Elizabeth.
- [20] Since he did not get a positive response he stopped payment of the vehicle's instalments.
- [21] Plaintiff repossessed the vehicle on 9 March 2009.
- [22] To challenge the defendant's allegation that the vehicle had latent defects, the plaintiff called Mr William Thompson an expert witness who testified that he has 22years experience as an auto electrician.

- [23] He said in December 2009 he inspected the vehicle to ascertain whether there was any electrical fault on it. When he inspected the vehicle he discovered that its battery was not fully charged. He suspected that the battery had been standing in a discharged stage for a long period which caused the battery to sulphate.
- [24] He said he could not find any fault with the battery when he tested it. He further said there was no fault with the alternator nor the lights of the vehicle which could negatively affect the normal functioning of the battery.
- [25] Importantly, he said after charging the battery fully he kept the vehicle for about 3 to 4 days at his premises and he did not experience any problems in starting the vehicle.
- [26] The defendant admitted that he is not an auto electrician and did not know what was the problem with the vehicle. The evidence of Mr Thompson that after charging the vehicle he kept it for about 3 to 4 days was unchallenged.
- [27] The defendant testified that after the vehicle was delivered, it could not start the next day and he experienced the problems when he started the vehicle. However the defendant did not lead evidence to prove that there was a latent


defect. Even if Mr Thompson inspected the vehicle after about 9 months I have no reason to reject his evidence that the vehicle's problem was the battery. The vehicle was earlier tested by Williams Hunt Foreways, Cadillac dealer, who also identified the problem of the vehicle to be the battery, see p38 of bundle A.

[28] In my view, the defendant failed to prove on the balance of probabilities that there was a latent defect. It is clear that there was a repudiation of the agreement by the defendant. The counterclaim must therefore fail.

[29] The plaintiff's case is based on a written agreement and quantum is not an issue.

[30] I therefore make the following order:

1. Defendant is liable to pay the plaintiff the sum of R424 078,24;
2. Defendant is liable to pay interest at the rate of 15,5% p.a. from date the date which summons was issued.
3. Defendant's counterclaim is dismissed with costs.
4. Defendant is liable to pay plaintiff's costs on the action, including the costs of defending the counterclaim.



AP LEDWABA
JUDGE OF THE HIGH COURT