IN THE HIGH COURT OF SOUTH AFRICA

(NORTH GAUTENG HIGH COURT, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE : ~~YES~~/NO
(2) OF INTEREST TO OTHER JUDGES : ~~YES~~/NO
(3) REVISED

DATE 22-2-12 SIGNATURE

Date: 2012-02-22

Case Number: A563/2008

In the matter between:

McCARTHY LIMITED t/a McCARTHY TOYOTA SINOVILLE Appellant

and

SOPHIE MALEKANE Respondent

JUDGMENT

SOUTHWOOD J

[1] The appellant appeals against the judgment and order of the Wonderboom magistrates' court which ordered the appellant to pay to the respondent the sum of R31 780,17. On 13 April 2010 the full bench referred this matter to the full court.

[2] The respondent was the plaintiff in the court *a quo*. She claimed from the appellant, the defendant in the court *a quo*, repayment of the balance of the deposit she had paid when purchasing a motor vehicle from the appellant. She based her claim on her purported cancellation

of the agreement. The court *a quo* found that the respondent was a good witness and had proved her case: she wanted to purchase a new motor vehicle and not a damaged motor vehicle and the appellant was not entitled to sell as a new vehicle a vehicle which is damaged.

[3] The respondent's case is a simple one. She bought a brand new vehicle from the appellant and the appellant failed to deliver a brand new vehicle to her. In her attorney's letter of demand dated 1 April 2005 it was alleged that she had purchased a brand new vehicle but after delivery she had found that the vehicle 'was a second hand motor vehicle with a dent'. On the strength of these allegations the respondent apparently purported to cancel the contract of sale. Later during the trial the respondent changed her stance and sought to rely on other faults or defects in the vehicle.

[4] In ***Singh v McCarthy Retail Ltd t/a McIntosh Motors*** **2000 (4) SA 795 (SCA)** at para 12 the court said:

> 'The right of a party to a contract to cancel it on account of malperformance by the other party, in the absence of a *lex commissoria*, depends on whether or not the breach, objectively evaluated, is so serious as to justify cancellation by the innocent party.'

In para 15 the court formulated the correct approach as follows:

> 'The test, whether the innocent party is entitled to cancel the contract because of malperformance by the other, in the absence of a *lex commissoria*, entails a value judgment by the Court. It is, essentially, a balancing of competing interests - that of the innocent party claiming rescission and that of the party who committed the breach. The ultimate criterion must be one of treating both parties, under the circumstances, fairly, bearing in mind that rescission, rather than specific performance or damages, is the more radical remedy. Is the breach so serious that it is fair to allow the innocent party to cancel the contract and undo all its consequences?'

[5] It is clear that the appellant did not deliver a second hand vehicle to the respondent. The question is whether the other defects relied upon by the respondent, if proved, could justify the cancellation of the agreement. In dealing with the evidence I do not accept the finding of the court *a quo* that the respondent was a good witness. She contradicted the terms of the agreement which she had signed and she could not explain why all her complaints, which she had written down, were not recorded in her attorney's letter of demand. She persisted in describing the vehicle as second hand when it clearly was not and she was inconsistent about her complaints. It is not clear from her evidence whether she saw a dent or a scratch on the bumper and it is not possible to determine the exact nature of her complaint about the interior of the boot. She clearly lacked objectivity and there is no reason to prefer her evidence to that of the appellant.

[5] The facts which are not contentious may be summarised as follows: On 17 March 2005 the respondent went to the appellant's Sinoville premises to buy a new vehicle. She negotiated the purchase of a new Toyota Tazz for a purchase price of R90 653,00. This price included the cost of supplying a radio and an air conditioner, both of which were extras. In terms of the agreement the respondent was required to pay a deposit of R50 000 – which she did on 17 March 2005 – and 53 instalments of R1 068,82 payable from 1 May 2005. The respondent wanted the radio and air conditioner to be fitted immediately and it was arranged that the appellant would deliver the vehicle to her on 18 March 2005.

[7] At about 18h00 on 18 March 2005, after all the relevant documents had been signed, the appellant, represented by Ms. Linda Steyn, delivered the vehicle to the respondent. Only the radio had been installed. There had been too little time to have the air conditioner fitted. Ms. Steyn arranged for the respondent to bring the vehicle back on Tuesday 22 March 2005 for the air conditioner. After taking delivery the respondent drove away from the premises. Unbeknown to both the respondent and Ms. Steyn there was a small scratch on the rear bumper where an amount of paint about the size of a woman's little finger had been removed and the undercoat was visible.

[8] On Saturday 19 March 2005 the appellant's sales manager, Gert Fourie, informed Ms. Steyn about the scratch on the bumper and she

telephoned the respondent to tell her and arrange that the scratch be repaired when the air conditioner was installed.

[9] On Tuesday 22 March 2005 the respondent took the vehicle to the appellant's Sinoville premises. According to Ms. Steyn this was for the air conditioner to be installed and the scratch to be repaired. The respondent told Ms. Steyn that the vehicle gets hot and Ms. Steyn arranged for this to be investigated by the workshop. There was no suggestion that the temperature gauge showed that the engine was overheating. There is no evidence that the workshop found that it was overheating. On 22 March 2005 the air conditioner was installed and the scratch on the bumper repaired.

[10] There is a dispute about what happened on 22 March 2005. According to the respondent, she took the vehicle to the appellant's premises because she did not want it any more. She wanted to cancel the deal and get her money back. She says the appellant's representatives told her they could not cancel the sale.

[11] The uncertainty about the respondent's case is highlighted by the pleadings. In her initial particulars of claim the respondent alleged that the appellant repudiated the agreement on that day and she accepted the repudiation thereby cancelling the agreement. After the appellant unsuccessfully applied for absolution from the instance on the ground that there was no evidence to support this cause of action, the

respondent amended her particulars of claim. She now claimed to be entitled to claim cancellation of the agreement because the vehicle was not brand new. She alleged that after delivery she had discovered the following:

(1) the vehicle had accident damage to the bumper;

(2) the interior of the luggage compartment was worn;

(3) there was no cigarette lighter;

(4) the odometer showed that the vehicle had travelled 85 km.

[12] In the light of all the evidence it is clear that there is no merit in any of these complaints. There was no accident damage to the bumper – only the small scratch referred to which was easily repaired. The evidence regarding the worn interior of the luggage compartment is so vague and contradictory that it is meaningless. A cigarette lighter could be supplied immediately and if the vehicle had travelled 85 km this would not indicate that the vehicle was not brand new. Some travelling was necessary to deliver the vehicle and have the radio fitted. There is a suggestion that this was more than usual but it was not shown to be excessive in the trade. It is significant that these complaints differ from those set out in the respondent's attorney's letter of 1 April 2005 when

he purported to cancel the agreement because the vehicle 'was a second hand motor vehicle with a dent'.

[13] In my view the evidence of Ms. Steyn about what happened on 22 March 2005 and thereafter is more probable. She received the car keys and documents, which is normal procedure, and she referred the respondent's complaint to the workshop manager. The respondent did not mention all the complaints she testified about and when Ms. Steyn telephoned the respondent to tell her to collect the vehicle the respondent said she no longer wanted the vehicle because it is a second hand vehicle. This is obviously consistent with what the respondent's attorney stated in his letter of 1 April 2005.

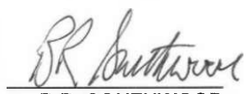
[14] There is therefore no basis for finding that the appellant's breach of the agreement, if any, is so serious that it is fair to allow the respondent to cancel the agreement. The court *a quo* should not have found that the respondent was entitled to cancel the agreement and claim repayment of her deposit.

[15] The appeal must therefore be upheld and the following order is made:

I The order made in the court *a quo* is set aside and replaced by the following order:

'The plaintiff's claim is dismissed with costs'.

II The respondent is ordered to pay the costs of the appeal.



B.R. SOUTHWOOD
JUDGE OF THE HIGH COURT

I agree

M.W. MSIMEKI
JUDGE OF THE HIGH COURT

I agree

H.J. FABRICIUS
JUDGE OF THE HIGH COURT

CASE NO: A563/2008

HEARD ON: 22 February 2012

FOR THE APPELLANT: ADV. E.P. VAN RENSBURG

INSTRUCTED BY: Van Zyl Le Roux Inc.

FOR THE RESPONDENT: In person

DATE OF JUDGMENT: 22 February 2012