IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Case Number: 36158/13

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES / NO.

(2) OF INTEREST TO OTHER JUDGES: YES / NO.

(3) REVISED.

5/1/2016

DATE

SIGNATURE

5/1/2016

In the matter between:

LEGADIMA GARDEN SERVICES CC PLAINTIFF

and

LIGHTSTORM ELECTRICAL CC DEFENDANT

Coram: HUGHES J

JUDGMENT

HUGHES J

[1] This trial was heard over a period of three days, 16 February 2015 to 18 February 2015 and the parties argued on 25 March 2015. The lengthy delay in providing the judgment is attributed to the fact that the file was misplaced and a duplicate file had to be obtained. My apologies to the parties for the delay and inconvenience that may have been caused.

THE EVIDENCE

[2] The case revolves around an oral agreement concluded on or about September 2012 between Mr Wim Viljoen (Viljoen), of Legadima Garden Services CC and Mr Joseph Jeremia Lombard (Lombard) for Lightstorm Electrical CC. The agreement involved the sale of a used Hitachi front end loader (front end loader), that the plaintiff purchased from the defendant.

[3] The plaintiff's action is based on the *action empti* which allows a purchaser to either cancel the agreement and /or claim damages. The plaintiff claims that the defendant breached the terms of the agreement in that the front end loader was found to be defective and not suitable for the purpose purchased. As such, the plaintiff argues, there was a breach of the warranty against latent defects.

[4] It is common cause that the purchase price of the front end loader was R180 000.00 plus vat of R25 000.00 which was paid by the plaintiff. Lombard drove the front end loader for 8 km in order to deliver it to Viljoen's and afford him with a demonstration on his premises that lasted five hours.

[5] The plaintiff pleaded that Lombard was a dealer and made himself out to be an expert of such goods such as the front end loader. Further, Lombard warranted that the goods were free of any latent defects and were suitable for the purpose so purchased.

[6] The defendant specifically pleaded that there were no latent defects and the goods were in good working order when delivered to the plaintiff. A five hour demonstration was given and the plaintiff even had his own mechanic inspected the front end load before he took possession of it. The defendant pleaded that the goods were sold *voetstoots* and there was no duty on the defendant to repair the goods. The defendant also denied that it was a dealer in front end loaders and like machinery.

[7] The plaintiff claims damages for the fair, reasonable and necessary costs incurred to repair the defects which amounted to R72 987.01. A further amount estimated at R90 000.00 is claimed for repairs that would arise after further investigate are conducted.

[8] Viljoen testified that he saw the front end loader on Lombard's premises amidst other vehicles. He attended on Lombard's premise three times to view it before purchasing the front end loader. He confirmed that Lombard drove the front end loader for about 8 kilometres to his premises. Lombard did conduct a demonstration on his premises in the presences of his friend, Mr Sievwright (Sievwright).

[9] Whilst the demonstration was being conducted by Lombard the front end loader ran out of diesel and had to fetch more to refill the front end loader after which the demonstration resumed. The demonstration ended when the front end loader drove over a tree stump which caused one of the tyres to be deflated. It was then driven into the shed where it was inspected by both him and Lombard where it was noted that there were minor leaks.

[10] The front end loader then stood on his premises for two weeks before he was able to obtain a tyre to replace the deflated one and only started using it in December 2012. During the period that the front end loader stood on his premises he paid the first portion of the purchase price of R180 000.00 on 26 September 2012 and the second payment of R25 000.000 on 11 October 2012.

[11] His operator used the front end loader for the first time in December 2012 when he operated it for only 3 hours when it started steaming. His operator attributed this to the radiator overheating. Viljoen said he instructed the operator to stop using it and obtained the assistance of Mr Vermaak (Vermaak), a diesel mechanic, to check it out in December 2012.

[12] Vermaak testified that the defects he found on the front end loader were indeed latent defects. He testified that as he worked one problem more problems were discovered. He states that in January 2013, he and Viljoen paid Lombard a visit

to advise him of the many problems that they had encountered. He further states that the front end loader was definitely not suitable for the purpose Viljoen had intended it for. As regards the computation of the invoice of R90 000.00 this was only done in March 2013.

[13] Mr Sievwright, a friend of Viljoen, was present when the front end loader was delivered to Viljoen. He testified that to him the demonstration by Lombard in moving concrete bricks on Viljoen's premises only took 2 hours.

[14] Mr Lombard testified that from time to time the defendant would sell earth moving equipment and as such had bought the used front end loader from an auction sale and was not told the history of the front end loader. The front end loader was sold to him *voetstoets* thereafter he drove it for 20km to his property. On arrival at his premises all he needed to do was hose it down as it was clean and neat. He was adamant that the demonstration on Viljoen's premises moving quite a sizable amount of tree trunks took 5 hours.

[15] The front end loader was moved to Viljoen's shed after it experienced a deflated tyre. Lombard, Viljoen and another gentleman, whom he did not know, walked around the front end loader and note that there were no major leaks. At this stage, to his mind, the deal was almost concluded but for affording Viljoen an opportunity to get his own mechanic to inspect it.

[16] He confirmed that Viljoen effected payment as he did and this concluded the deal. He stated that Viljoen and other gentlemen attend on him at his premises sometime in January 2013. This was a heated confrontational meeting as he felt threatened by the Viljoen.

[17] He stressed that there was no warranty with the purchase and that the warranty clause that appeared on the invoice was applicable to the generators which were sold by the defendant. He was adamant that he had advised Viljoen that there was no warranty and that it was being sold *voestoets*.

[18] To questions posed about the warranty, he stated that if there had been one it would not be operative, as Viljoen had already obtained his own mechanics to repair

it prior to coming to him to attend to any repairs that were necessary under the warranty.

THE LAW

[19] Adv Killian, for the plaintiff, argues that the action of the plaintiff is based on the *actio empti* and that at the very least an implied warranty against the latent defects was given by the defendant.

[20] *Van Der Merwe v Meades 1991 (2) SA 1 (A)* dealt with the issue of an action based on the *action empti* and in the headnote the following is stated:

"A seller will be deprived of the protection afforded by a voetstoots clause where the purchaser can prove that the seller (1) was aware of the defect in the *merx* at the time of the making of the contract and (2) *dolo malo* concealed its existence from the purchaser with the purpose of defrauding him."

[21] A seller may be able to hide behind the *voetstoots* clause between the parties only if he/she is not a merchant/ manufacturer of the goods so sold or where the seller was not aware of the defects and as such did not conceal them from the purchaser or where no warranty, expressly, impliedly or tacitly was given to the purchaser by the seller. The available remedy for the purchaser is that of cancellation (in terms of breach of contract) and damages.

LATENT DEFECT

[22] A latent defect was described in *Ciba-Geigy (Pty) Ltd v Lushof Farm (Pty) Ltd en 'n Ander 2002 (2) SA 447 (SCA) at para [48]* :

"In *Holmdene Brickworks (Pty) Ltd v Roberts Construction Co Ltd 1977 (3) SA 670 (A)* word 'n verborge gebrekop 683H omskryf as 'an abnormal quality or attribute which destroys or substantially impairs the utility or effectiveness of the *res vendita*, for the purpose for which it has been sold or for which it is commonly used'."

THE PLEADINGS

[23] The defendant specifically pleaded that the front end loader was delivered on 17 September 2012 on the special instance and request of the plaintiff. That as per the oral agreement a demonstration which lasted five hours was given to the plaintiff. The front end loader was inspected by the plaintiff's own mechanic and retained by the plaintiff after the demonstration. The front end loader was used for two weeks before the first payment was then effected by the plaintiff thus the front end loader was suitable for the purpose intended by the plaintiff, however the plaintiff instead used the front end loader as a bulldozer.

[24] Of importance is the defendant's plea that the damages caused were not latent and were in fact caused by the plaintiff's miss use of the front end loader and due to the plaintiff's own actions.

[25] The plaintiff disputes that the length of time of the demonstration as being five hours. On the plaintiff's own witness's version, Sievwright, the demonstration could not have been more than two hours. The plaintiff denies that the front end loader was used for two week and persist with the contention that it remained in the position that defendant had left it in the shed until a tyre could be obtained. This was only obtained after the two week period, when his operator used it for the first time.

ANALYSIS

[26] I am mindful of the warning sounded out that pleadings are for the court and the court not for the pleadings and that a court will not necessarily have regard to the exact terms of the pleadings, but rather the substantial issues between the parties. See *Harms Civil Procedure in the Superior Courts (LexisNexis) at B-138*; *McCarthy Ltd t/a Budget Rent a Car v Sunset Beach Trading 300 cc t/a Harvey World Travel and Another 2012 (6) SA 551 (GNP) at para [11].*

[27] In this instance the case made out by the defendant differs materially from that advanced in his testimony before court. As set out above the defendant pleads

that the plaintiff bought the front end loader for the purpose it was intended however due to the plaintiff's misuse the damages ensued.

[28] However, in evidence the defendant places reliance the front end loader having been bought *voestoots* and without any warranty. Thus, the defendant had no obligation to repair the front end loader. Further, even if there was a warranty the plaintiff did not give him the first opportunity to repair the damages.
Lambard evidence:
"I delivered the machine to you, I gave you two weeks to test the machine, get your mechanics, you bought it voetstoots, you had more than enough opportunity to make up your mind before you purchased this machine. I told you where the machine comes from. I did not have any record of the history of the machine. And we sold it 'no duty to repair'." [Page 207 of the record lines 11-18]

[29] Adv Kruger, for the defendant, argued that even though Lambard's testimony does not conform with the pleadings his testimony was truthful and consistent, in that, he had not varied from his verbal evidence. I agree with the argument that, yes indeed, Lambard did not vary his verbal evidence and was consistent in his testimony that differed from the pleadings itself.

[30] From the proceedings it is evident to me that the defendant had broadened the ambit of his defence. Viljoen had not been granted an opportunity to deal with these other than by way of cross-examination of the defendant and in closing argument. In enlarging his defences, in these circumstances, I am not bound by the pleadings, and propose to deal with all the issues before me inclusive of the defences raised in the defendant's testimony, as I am duty bond to ensure that the issues between the parties are dealt with, without prejudice to anyone of the parties.

[31] Adv Killian argues that at the least an implied warranty was given by the defendant in that he knew for what purpose the front end loader was being purchased and confirmed that it would serve the said purpose. The defendant even took time out to demonstrate the workings of it and in doing so he gave himself out to be an expert and having knowledge of its workings. Further, the defendant's admission that it traded in the such machinery from time to time, the fact that

Lambard had a keen eye to spot a 'steal' of a deal and his special knowledge of the machinery, cumulatively, it was argued, bring about an implied warranty having been issued.

[32] To me from the evidence of Lambard it was clear that he was well conversant with this type of machinery. He knew of the price ranges of a new front end loader as opposed to a second hand one. He was also well versed in the mechanical workings of the front end loader as he operated it for five hour when he conducted the demonstration. He testified that he conducted this demonstration as knew he had to show Viljoen that the hydraulics was in working order and that Viljoen ought to hear the motor running and that it was in driving condition. At Page 198 of the record lines 3-5 *" ...The hydraulics was working fine, because you have got to lift the bucket up, and the brakes is working hydraulics, the gears is working hydraulics"* .

[33] This, in addition, to him having the knowledge that he had got the front end loader at 'steal' pricewise is a clear indicator that he had the specialised knowledge of these machines which he sold from time to time. With this background it would be fair to say that he was a dealer of these machines and the like.

[34] Once it is established that he is a dealer in the good the implied warranty kicks in and as such the plaintiff has the *action empti* at its disposal. I am in *ad idem* with Adv Killian that the defendant would not have gone through such lengths at its own expense, if not to reassure Viljoen, of the workings of the front end loader.

[35] To this end I refer to Page 201 of the record lines 6-9 where Lambard states: *"He saw the machine, it is working, all the hydraulics is working, it is lifting up the heavy tree trunks, I am pushing the tree trunks. He was happy with the machine. Everything was working fine on the machine."*

[36] In the light of the defendant's conduct, resonating with that of a dealer, does the '*voetstoots* and no duty to repair' defences, hold any water in these circumstances?

[37] KERR *The Law of Sale and Lease* at pages150-151 states the following of *voetstoots*:

"...a voetstoots clause is a clause that stipulates that the seller is not to be held responsible for the diseases or defects and goods are sold 'as it stands' or 'with all its faults'. The effect of such a clause is that the seller does not take the risk of the presence of any diseases or defects, but is liable for misrepresentations of any kind."

[38] In my examination of the conduct of the parties, I am incline to agree with Adv Killian that the conduct of the defendant in the sale does not demonstrate that the sale was one of *voetstoots*. On his own evidence he states that the auction sale being *voetstoots* only permits the auctioneers to start the machine before one purchased it. Lambard having brought the goods *voetstoots,* not have the history and knowing that it could break anytime goes even further to drive it for 8km and then give a full five hour demonstration, leaves it at the plaintiff's premises for two weeks for the plaintiff's own mechanic to examine it and only seeks payment after being advised by plaintiff that the plaintiff's mechanic had looked it over.

[39] This to my mind does not resonate with a *voetstoots* sale 'as it stands with all its faults'. I agree with the plaintiff that the only conclusion, on Lambard's own testimony, is that the sale could not have been by way of *voetstoots*.

[40] Likewise, with the defendant's reliance on the 'no duty to repair' agreement between the parties, I do not find that the defendant has made out a case. The evidence of Lambard himself dispels this notion where he states that Viljoen can't come some six months after the sale with an 'heck' of an invoice and seek that Lambard pay him for that which he has expended as he had not even given him an opportunity to conduct the necessary repairs, as the seller.

See Page 228 of the record lines19-22 *"MR KRUGER: Where you afforded an opportunity to fix this machine? Or to attend to this machine? --- No, My Lady. That was one of my concerns afterwards. That I was never informed about any complaints or breakages on the machine."*

[41] Has the defendant shown that the front end loader was misused by the plaintiff, thus resulted in the damages as initially pleaded? On Lambard's own version he noticed the plaintiff use it occasionally before payment was even made. In these circumstances if he had front end loader it is surely reasonable to expect that the machine would have packed up sooner. In the circumstances this evidence of the Lambard is contrary to it being misused. Mention is also made by Lambard that he witnessed the front end loader on Viljoen's property being utilised during October and November 2012 well after the two weeks and that being the case if it was being misused it would have encountered problems before December 2012.

[42] In the defendants plea it is stated that the machine was used as a bulldozer however when Lambard testified he conceded that he did not see the front end loader being used as a bulldozer. In these circumstances the defendant has failed to show that the plaintiff misused the front end loader.

THE QUANTUM

[43] The only evidence before me is that of Vermaak, the defendant does not have any evidence to rebut this evidence. To me Vermaak's evidence only substantiates the claim for R 72 987.01 and does not make out a case for the future amount claimed of R90 000.00. I say so because Vermaak gives a clear account in his testimony of the work conducted on the front end loader, the periods when this was conducted and the amounts for each task as is evident in exhibit V1. He testified that he attended to the plaintiff's front end loader for the first time in December 2012 just before Christmas.

[44] Vermaak tenders an explanation for the late submission of his company's invoices, J C Earthmoving Machine Repairs, as reflected on V1. There are also invoices and proof of payments made of the other amounts reflected on V1.

[45] Whilst working on the front end loader he had made the vehicle safe and was to return to work on it further when the operator of the plaintiff interfered with it attempting to move it after Vermaak had secured.

[46] In the circumstances I cannot exclude the fact that the operator may have been responsible for the later work required as he operated the front end loader after Vermaak had secured the machine. Further to the above Vermaak in his report also indicated uncertainty as he states *"Costs will be estimated on R90 000.00 but the machine must be stripped to see what must be replaced and fixed."* This is not setting out ones claim in a clear and concise manner as required. In my view this claim must fail.

[47] For the reasons set out above I find that the amount claimed of R72 987.01 has been established and proven by the plaintiff, however the amount of R90 000.00, being the second amount claimed, has not been proven by the plaintiff.

COSTS

[48] With regards to the costs the costs are to follow the result. As the plaintiff was successful in proving its claim, albeit be it just one of its claims, the plaintiff is entailed to costs on a party and party scale.

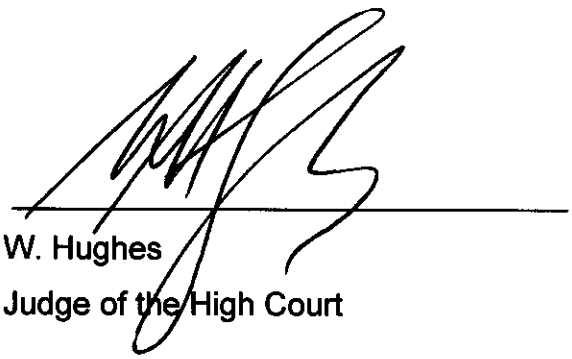
[49] The letter of demand was sent to the defendant on 18 April 2013. From this date no response or defence was raised by the defendant until summons was issued and served on 13 June 2013.

[50] Consequently the following order is made:

[1] The defendant is ordered to pay the plaintiff an amount of R72 987.01;

[2] Interest on the aforesaid amount at the prescribed rate per annum is to run *tempore morae*, to date of final payment, both days inclusive;

[3] The defendant is to pay the plaintiff's costs on a party and party scale.



W. Hughes

Judge of the High Court