IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

22/11/16.

CASE NO: 98160/15

In the matter between:

RDM ROAD SOLUTIONS (PTY) LIMITED Plaintiff

and

(1) REPORTABLE: ~~YES~~ / NO

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

21/11/16
DATE

SIGNATURE

PARAMOUNT TRAILERS CC First Defendant

PARAMOUNT TRAILERS (PTY) LIMITED Second Defendant

JUDGMENT

Tuchten J:

1 The first defendant was at a stage converted from a close corporation into a company. This explains the reference in the heading to this judgment to two defendants. It is common cause that the reference to the first defendant is no longer appropriate. No point was taken on either side of the translation of the defendant from close corporation to company and I shall simply refer in what follows to the defendant.

2 During February 2014, the plaintiff accepted a tender by the defendant to manufacture and supply to the plaintiff ten trailer units for a purchase price of R4 850 000 million plus VAT of 14%. Each trailer unit consisted of a leading and a following trailer, so the contract was to deliver twenty trailers in all. The plaintiff is a haulier, specialising in the delivery of commodities from different locations in South Africa to Zimbabwe and Zambia. Sometimes the plaintiff makes bulk deliveries such as unpackaged grain. So the trailers had to be designed to load and unload bulk items. Specially designed doors at the ends of the trailers catered for this.

3 The plaintiff intended the trailers to be drawn by mechanical horses, which the plaintiff anticipated buying for delivery contemporaneously with delivery to it of the trailers.

4 In asking the defendant to tender, the plaintiff acted through its agent Mr Peter Grove, who traded as Peter Grove Tractor Sales. The defendant's quotation, dated 27 January 2014 included a three page document (the specifications document) setting out the specifications of the trailers which the defendant was offering to build, a one page document headed "terms and conditions" and a drawing of the leading and following trailers which the defendant was offering to manufacture.

5 The trailers which the defendant offered in its quotation to build did not comply with critical requirements of the plaintiff as to both the length and weight of the trailers. These were critical because of strict regulatory requirements applicable to such vehicles. Haulage units were routinely examined and weighed at the borders the plaintiff's vehicles had to cross and very serious negative consequences for the plaintiff would follow if it were found that the haulage units did not comply with regulations both as to length and weight.

6 In a letter dated 31 January 2014, Grove accepted the quotation subject to "provisos" which he set out. In a letter dated 3 February 2014, Mr Taylor, the managing director of the plaintiff wrote to the defendant confirming the acceptance of the defendant's quotation. In the letter Taylor emphasised that the specifications of the trailers had to be "strictly" as per the defendant's quotation and Grove's letter dated 31 January 2014. Taylor emphasised the importance of delivery dates because of the plaintiff's need to synchronise the arrivals of the horses and the trailers. On 12 March 2014, Grove signed a new drawing prepared by the defendant in which certain amended specifications of the trailers as to length and weight were recorded. These amended specifications were within the limits demanded by the plaintiff.

7 But what was not varied when the agreement was concluded on 12 March 2014 was the specification in the specifications document which related to the chassis of the trailers which read:

> Fabricated 6mm/5mm "I" Beam with high tensile top and bottom flanges - 130 X 12 Flat Bar 55C

8 During the negotiations preceding the conclusion of the agreement, Grove made Mr Marques, the managing director of the defendant aware, amongst other things, of the need for the trailers to comply with the length and weight regulations. Marques then, in consultation with his engineer and draftsmen, redesigned the trailers to make the trailers regulation compliant.

9 As part of the process of redesigning the trailers to make them regulation compliant, Marques decided to change the specification of the "55C" steel to "Domex" steel. Domex steel is stronger than 55C steel. But of great importance for this case, Marques decided to change the specification of the flanges of the I bars from a thickness of 12mm to a thickness of 8mm.

10 I bars formed major structural components in the trailers. The flanges are those components of the I bar which form the head and the foot of the capital letter I, from which the I bar gets its name when viewed in cross-section. The body of the I bar is known as its web.

11 The change of the flange thickness from 12mm to 8mm resulted, notwithstanding the greater strength of the Domex material compared with the 55C material, in a significant weakening of the structure of the trailer. This was proved by the evidence of the expert, Dr Grobler, called by the plaintiff and was confirmed by both Prof Koursaris, the expert who testified for the defendant, and by Marques himself.

12 It is common cause that on 12 February 2014, the date on which the agreement was concluded, the agreement embodied the specification that the I bar flanges must be constructed from 12mm material. It is also common cause that at that date neither Grove nor anyone else from or acting for the plaintiff had been told of the changed thickness specification which Marques had decided to implement.

13 The experts and Marques were agreed that the thickness change was material and operated to the plaintiff's disadvantage and by itself, without regard to any other factor, significantly reduced the anticipated lifespan of the trailers. I need not go into this in any detail because in

argument it was accepted as the position by counsel for the defendant.

14 Almost from inception, the trailers gave trouble. The first problem that manifested itself related to the trailers' braking systems. These problems seem to have arisen because certain components in the braking systems supplied to the defendant were incorrect. The braking problems were rectified by the defendant when they were brought to its notice. Sometimes, of course, the problem arose when the trailer was far away from the defendant's premises in Gauteng. Then the plaintiff had to have running repairs done, which it did through one of its service providers local to where the breakdown took place.

15 But then another problem arose: cracks in the chassis of the trailers began to appear, particularly at the welded union of a component called the hanger bracket with the I beam from which the chassis was constructed. The hanger brackets connected the chassis with the axles below them.

16 It took some time for the cause of these cracks to be determined. One of the suspected causes was the way the trailers had been used and maintained. Another was that the hanger bracket design included very close to its junction with the I beam a 14mm hole. The defendant had

specified that a branded product called a Henred 127 round 1910 track axle with auto slack adjusters would be used in the construction of the trailers. The Henred product came with hanger brackets which had these holes predrilled in them.

17 The agreement included a 12 month warranty. The constant requests by the plaintiff that the defendant repair the brake and cracking problems free of charge caused the defendant to lose patience with the plaintiff. At a meeting in March 2015, the defendant's representatives told those representing the plaintiff in effect that the plaintiff would have to start paying for repairs and that the defendant would no longer recognise warranty claims. In an eleven page report dated 1 March 2015, prepared by Marques, the conclusion was drawn that the damage manifesting itself was the result of driving on poor roads and poor maintenance.

18 And then, in a letter dated 31 July 2015 written by the defendant's sales manager, Mr Canny, the defendant took up the position that the plaintiff had breached the warranty by having repairs done by service providers other than the defendant, thus relieving the defendant of the obligation to carry out any further repairs of the trailers free of charge. This was a significant cause of the hardening of the commercial relationship between the parties.

19 The facts I have recounted are either common cause or not seriously disputed. But in about August 2015, Taylor, who gave evidence for the plaintiff, testified that he discovered the fact that the I beam flanges which had been used in the construction of the trailers were of 8mm and not 12mm material.

20 Taylor said that he communicated his discovery to both Taylor and Mr Thys Pelser, the technical manager of the plaintiff. Pelser was the official at the plaintiff responsible for keeping its vehicles, including the trailers, on the road. Grove had carefully noted on his documents all changes to specifications discussed and agreed with the defendant or even contemplated. There was nothing in his notes suggesting that he, Grove, had ever discussed changes to the flange specifications with Marques, let alone agreed to them.

21 The plaintiff consulted its attorneys. By letter dated 9 November 2015 written by the plaintiff's attorney to the defendant, the plaintiff said:[1]

> Since 5 Augustus 2014 [the plaintiff] encountered numerous breakdowns of the trailers due to inter alia faulty brakes, the fitment of non-holdex automatic slack adjusters to the Henred Axles, incorrect booster fitments, cracking of the chassis, weld cracking and incorrect fitting of 130mm x 8mm instead of 13-mm x 12mm as quoted.

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1 Paragraphing numbering omitted.

> It further transpired that instead of Steel grade 55 C of BS 4360 specification as quoted, the chemical composition of the 130mm x 8mm flat bar did not conform to such standard, due to the fact that it contained manganese which is higher than the maximum amount stated in the standard. The cracking of the welds was also attributed to poor welding practices.

22 In its attorney's letter, the plaintiff asserted that the trailers did not comply with the agreed specifications, cancelled the agreement and demanded the repayment of the purchase price against return of the trailers.

23 The defendant replied to this letter in a letter dated 23 November 2015 written by the defendant's attorney. In the reply, the defendant "denied that it failed to produce Trailers that do not comply with the specification as alleged ..."; asserted that "the specifications were provided and discussed with ... Grove who managed and supervised the entire contract with fine tooth and comb"; and denied in their entirety the allegations that "the Trailers were not manufactured in accordance with specifications ...".

24 The plaintiff issued summons against the defendant on 8 December 2015. The plaintiff's cause of action is that the defendant had committed three specified material breaches of the terms of the

agreement on the strength of which the plaintiff had cancelled the agreement as per its attorney's letter. The plaintiff recorded the fact of the tender and the defendant's refusal to comply with the demand for repayment and claimed an order declaring the contract to have been validly cancelled, together with repayment of the purchase price, interest from date of demand and costs.

25 The first specified breach on which the plaintiff relies are is that the

> ... bottom flanges of the chassis I-beams have been altered from the 130mm width x 12mm thickness specified for BS4360 Grade 55C material to 130mm width x 8mm thickness using EN10149S 700MC material.

26 The second such alleged breach was of that the welding between the flanges and the hanger brackets was sub-standard and lacked appropriate tack welds. The third breach was that trailers had been manufactured with inferior landing legs. No reliance was placed on these second and third alleged breaches by the plaintiff's counsel and I need refer to them no further.

27 As to the change of the character of the material, it is common cause that the substituted material was stronger than that specified. So the breach, if established, would not be material. I need deal no further

with this allegation either. All that remains for consideration is the change from 12mm to 8mm material (the thickness allegation).

28 The defendant pleaded that damage to the chassis was a result of the "normal use of the vehicles ... and the road conditions to which the vehicles were subjected ...". In specific response to the thickness allegation, the defendant pleaded:[2]

> The ... Defendant admits to making the alteration with the consent of the Plaintiff's agent [ie Grove].
> As a result of the changes the weight of the trailer was reduced.
> As a result of the changes the chassis was lightened in comparison to the original design.

29 The contents of the plea and the other documents to which I have referred in this regard are significant because of the actual defence to the thickness allegation as it emerged during the trial: that after the conclusion of the agreement on 12 February 2014, the agreement had been varied to provide for the new specification. The defendant alleges that during the construction process, Grove asked Marques how the defendant had achieved the weight saving which brought the trailers (together with the plaintiff's payload requirement and the weight of the horse) within the regulatory limit. In response to this

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2 Paragraph numbers again omitted.

question, thus the defendant (and Marques in evidence), Marques drew the variation of the specification to the attention of Grove. When this was brought to Grove's attention, Grove made no objection.

30 This dispute as formulated raises an issue the resolution of which depends on the probabilities and the credibility of the witnesses who testified to the issue, Grove and Marques in the main but also Pelser. It was accepted by counsel for the defendant that the onus was on the defendant to prove the variation. In my view, this concession was properly made. See *George v Fairmead (Pty) Ltd* 1958 2 SA 465 A 470A.

31 Grove in his evidence denied that the thickness change had been brought to his attention. He said that if it had been brought to his attention, he would have accepted the variation because he believed that the defendant, which had designed the trailer, knew what it was doing. Groves said that if the variation had been brought to his attention, he would have made a note of it. But it is established that Grove made no such note. I found Grove to be a careful witness. He noted all the other variations to the typed specifications provided to him. Although he has no technical qualifications, his business has been since 1987 to buy and sell used trailers and to advise on the purchase of trailers. He has much practical experience in the industry.

Grove said that when he discovered the variation he told Taylor and Pelser of his discovery. This was confirmed by Pelser.

32 To reject this evidence, I must find that Grove manufactured a version. But that is not the impression I gained from Grove in the witness box. He struck me as a witness who was trying to tell the truth.

33 I did not find Marques to be an impressive witness. He was given to sweeping statements that he later had to qualify. In his evidence he stated that his report dated 1 March 2015 did not deal with any matters which arose before conclusion of the agreement. But Marques was driven to concede that a whole paragraph of the report dealt with matters which arose prior to manufacture. During his evidence he said that he had inspected the trailers during 2016 and had found that no maintenance had been done on them. After an adjournment, without prompting, Marques qualified his evidence about maintenance: he said he accepted that maintenance had been done, but it was sub-standard maintenance. While this qualification is an indication of honesty, it lends weight to the conclusion that as a witness Marques is not careful and is therefore not entirely reliable.

34 A third criticism I have of Marques relates to the reliance he sought to place on a document produced by the plaintiff called its standard terms and conditions. Clause 3.5 of that document requires variations on orders placed on the defendant must be in writing signed by both parties. When cross-examined on this document, Marques said that when he was on good terms with the client, he did not follow the prescription in clause 3.5. He could not explain why the defendant had standard terms and conditions if its managing director did not abide by them.

35 A fourth criticism of Marques arises from paragraph 15 of a joint minute between the experts and confirmed in the evidence of Dr Grobler: a firm such as the defendant ought to have performed a fatigue analysis with a recognised design code for welded joints before replacing the 12mm material with 8mm material. In fact such an analysis was not performed and the defendant had no such design code for welded joints. This pointed, thus Dr Grobler, to inadequate supervision and guidance of the defendant's welders. It was in my view Marques' job as managing director, to see that these things were done properly.

36 Marques may have made some passing reference to Grove during the manufacturing process to the fact that the trailers the defendant was making would not be as strong as those the defendant had originally designed. But if Marques did so, then his purpose was as a sop to his own conscience and no more. If he had wanted to vary the specification he would have done so in writing and explained the inferiority of the product as varied in comparison to the original specification.

37 In fact, there is no mention in the several bundles of documents placed before me and which preceded the plea of a change in the thickness of the material. All one finds is a reference to the quality of the roads in the context of the allegedly poor way in which the trailers were driven and maintained. The parties spent some time debating the cause of the cracks. At no stage did Marques or anyone else for the defendant say in effect:

> *But you agreed to the change. I warned you that the trailers could only be driven on highways and you accepted that.*

38 If the variation agreement had been concluded, the defendant would have relied upon it as its main point in the debate about the defects in the trailers, how the defects were to be fixed and who should bear the costs of remedial work. But nobody from the defendant did so

either in the oral discussions or the documents which arose from the debates or even when the defendant's attorney replied to what the plaintiff's attorney had written to the defendant. I accordingly conclude that the probabilities are against the conclusion of the variation agreement. The defendant has accordingly failed to establish its existence.

39 Counsel for the defendant submitted that the existence of a warranty in the agreement precluded the plaintiff without more from cancelling the agreement for material breach without first putting the defendant in mora. In my view the terms of the agreement do not so limit the plaintiff's right to cancel for material breach. In any event, the unchallenged evidence of Dr Grobler was to the effect that a reconstruction of the trailers with the correct material, while theoretically possible would not have been practical. The trailers would have to be literally dismembered; then the dismembered components would have to be ground to suitable dimensions and new members welded in.

40 But the greatest problem with counsel's proposition, it seems to me, is that the 12mm material was replaced because the 12mm material was too heavy. If it had been reinstated, the weight problem would have recurred.

41 It follows, subject to what I am about to say, that the plaintiff is entitled to the declaration and the order for repayment which it claims. But counsel for the defendant submitted that an order for repayment of the purchase price against a tender to return the trailers was not competent because the condition of the trailers had deteriorated since the tender was made in November 2015.

42 *Feinstein v Niggli and Another*[3] dealt, within the rubric *restitutio in integrum*, authoritatively with the position where an innocent party cancels a contract, tenders return of the benefits received and claims repayment of the purchase price.[4] The object of the rule that the party claiming return of the purchase price must tender return of what he received under the contract is that the parties ought to be restored to the position in which they were at the time they contracted. The reason is that the innocent party may otherwise unjustifiably be enriched and the guilty party correspondingly impoverished.

43 But since the rule is founded on equity, it may be departed from where considerations of equity and justice necessitate such a departure. Thus,[5]

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3 1981 2 SA 684 A

4 At 700-701

5 *Feinstein v Niggli and Another* 701A-C

> ... the deterioration in condition or the depreciation in value of the subject-matter of the contract while in the representee's possession will usually not preclude *restitutio* if that occurred in the ordinary course of events, or through its being used in the normal way as contemplated by the parties, or through some inherent defect or weakness in the subject-matter itself, and was not due to any fault of the representee .... Even where the deterioration or depreciation is due to the representee's fault, *restitutio* is not necessarily precluded, for the Court may allow him to adjust the deficiency by a monetary compensation.

44 The issue of the inadequacy of the tender, if it were raised at all in the defendant's plea, was raised like this:[6]

> The ... Defendant notes the tender but pleads that contrary to the alleged cancellation ... the Plaintiff continues to use the trailers. The Plaintiff is called upon to cease using the trailers to the extent that it relies on the cancellation of the contract.

45 As a proposition of law, the passage I have just quoted is simply wrong. There is nothing which precludes a party who has cancelled a contract and tendered return of the *merx* from using it. Such use may have consequences, but no issue was raised in that regard in the plea. *Extel Industrial (Pty) Ltd and Another v Crown Mills (Pty) Ltd*[7] is

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6 Paragraph 17

7 1999 2 SA 719 SCA

an example where the court, after affirming that the restoration rule in question is founded on equitable considerations,[8] declined to enter upon the question because it had not adequately been raised in the pleadings.

46 Christie[9] deals extensively with the topic and refers to the judgment in *Harper v Webster*[10] in which the point was made that the innocent party who cannot make complete restitution may make good the deficiency in money. As a general proposition, where a purchaser has rescinded the contract of sale and has tendered return of the goods purchased and the seller refuses the tender, the seller is in *mora creditoris*. In these circumstances the purchaser owes no greater duty to the seller than that he will not injure the goods intentionally or by negligence. *Wingerin v Ross and Another* 1951 2 SA 82 C 86D.

47 The proposition that restitution is an equitable remedy has been affirmed at the highest level. In *North-West Provincial Government and Another v Tswaing Consulting CC and Another,*[11] the Constitutional Court observed that the party raising the issue of a deficiency in a tender was free to establish that claim in appropriate

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8 At 734E

9 *Christie's The Law of Contract in South Africa* 6th ed, 2011, 301-303

10 1956 2 SA 495 FC 499-500

11 2007 4 SA 452 CC para 22

proceedings. The court had in mind, I think, a claim based on unjustified enrichment.

48 Marques in his evidence, after being encouraged to be generous to the defendant in this regard, put the cost as at the second half of 2016 of repairing the trailers at R1,4 million. Against that, the defendant had the use of the plaintiff's money for some two and a half years. I assess the value of that sum, roughly R5 million, at the current *mora* interest rate of 9% per annum, to be roughly R1,1 million. In addition, the plaintiff has had to spend money repairing the cracks to the chassis and has suffered consequential losses through inability to use the trailers while they were being repaired, a loss the plaintiff's witnesses called down time.

49 Viewing the evidence against the principles I have mentioned, I have decided to order the defendant to pay the plaintiff *mora* interest on the sum claimed by the plaintiff not from date of demand (ie 9 November 2015) but from date of judgment. I think I am being generous to the defendant. If the defendant feels aggrieved, it is free to claim compensation from the plaintiff in appropriate proceedings.

50 By refusing to accept the plaintiff's tender of restitution, the defendant fell in my judgment into *mora creditoris* in that regard. It can therefore no longer insist on the return of the trailers reciprocal with the defendant's obligation to repay the purchase price.[12] The trailers are being used by the plaintiff to carry goods and may not even be in the Republic when this judgment is delivered. The plaintiff offered to accumulate the trailers at its place of business within ten days of payment by the defendant. I shall incorporate this offer in the order for return of the trailers which I shall make.

51 I make the following order:

1 It is declared that the plaintiff validly cancelled the contract between the parties.

2 The second defendant is ordered to pay the plaintiff the sum of R4 850 000 plus VAT of 14%.

3 The second defendant must pay *mora* interest on the sum of R4 850 000 at the rate of 9% from the date of this order until the date of payment.

4 Within ten days after receipt of payment under both 2 and 3 above, the plaintiff must return to the defendant at the defendant's premises in Gauteng or such other place as may

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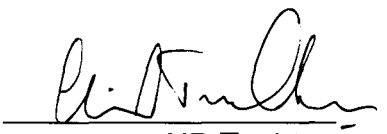
12 Wessels, *The Law of Contract in South Africa* vol 1 (1937) para 2338

be agreed between the parties the ten trailer units sold and delivered by the defendant to the plaintiff (twenty trailers in all).

5 The defendant must pay the plaintiff's costs of suit.



NB Tuchten
Judge of the High Court
21 November 2016

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