REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA
(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

Case No: A352/2003

In the appeal between:

MAXIDOR (PTY) LTD Appellant

and

FLEXWARE (PTY) LTD Respondent

JUDGMENT DELIVERED ON 9 SEPTEMBER 2005

ZONDI AJ

1. This is an appeal against the whole of the judgment of the Goodwood Magistrate's Court handed down on 10 February 2005.

2. The respondent (plaintiff *a quo*) had issued summons against the appellant (defendant *a quo*) for an order confirming cancellation of the contract, payment of the sum of R21 934-00 to the respondent paid in terms of the contract and return of the security gates to the

appellant. The court *a quo* entered judgment in favour of the respondent.

3. It is common cause that on 14 March 2003 the parties entered into a written agreement of sale in terms of which the respondent purchased from the appellant certain security gates which were to be installed at the respondent's premises.

4. The basis of the respondent's claim was that in terms of the agreement, the appellant had agreed to supply and install security gates of high quality and which would be suitable for external installation. The appellant had guaranteed its security gates against rust and chipping for a period of fifteen years.

5. The respondent averred that the appellant was in breach of the agreement in that the security gates showed signs of rust only three weeks after they had been installed. It stated that the breach of the agreement was material in that it would not have entered into the agreement had it known that the security gates would start

showing signs of rust so soon after the installation and that they were not suitable for external installation.

6. Mr. and Mrs. Marais testified for the respondent. Their testimony was to the effect that they were informed by Mr. Assure that the appellant had two ranges of products which it marketed. One was the top of the range and the other the middle of the range. The appellant advised them on a particular range of product that would best suit their needs. The advice was given on the basis that they wanted to install the security gates at their residential premises and that the area in which they resided was the most peaceful one. They were further told that if the security gates were required for commercial and factory use they had to buy the top of the range ones.

7. Based on the respondent's requirements and risk factor analysis the appellant recommended the middle of the range product to Mr. and Mrs. Marais. They further testified that they were not informed

by the appellant that the middle of the range product was not suitable for external installation or that weather conditions were relevant in making a choice of a particular range of product.

8. They further testified that the terms and conditions of the sale agreement which appeared on the reverse of the invoice were never brought to their attention and in particular that the 12 months guarantee against rust and chipping applied only in respect of the products which were installed on the inside of the premises.

9. On the other hand, while admitting the existence of the agreement of sale as pleaded by the respondent, the appellant denied that it had guaranteed its two products against rust and chipping for a period of 15 years. The appellant averred that as the agreement between the parties was in writing it was entitled to assume that the respondent was aware of the terms and conditions of sale when it signed the document embodying them. In particular the appellant contended that in terms of the agreement of sale, the guarantee period was 12 months and was only in respect of the

products installed on the inside of the premises.

10. The appellant further stated that in an effort to resolve the dispute between it and the respondent, it had offered to replace some of the security gates free of charge and to upgrade others to the top of the range at a cost of R1700-00 and which offer was rejected by the respondent.

DISCUSSION

11. It is correct that the issue for determination by the court *a quo* was whether the appellant breached the agreement when it supplied the respondent with a product which was not suitable for fitting on the outside of the respondent's premises and whether the respondent was entitled to cancellation of the agreement and restitution.

12. It is common cause between the parties that they had entered into a written agreement for the sale and the installation of the

security gates at the respondent's premises at the purchase price of R21 934-00. It is also an agreed fact between the parties that some few weeks after installation some of the gates showed signs of rusting.

13. What is however in dispute is first, whether the respondent was aware or had been made aware of the terms and conditions which appeared on the reverse of the invoice. Second, whether choice of range of product and the place of its installation by the respondent had any effect on the 12 months guarantee.

14. I find in favour of the respondent on the first issue. It is the respondent's evidence that it was neither aware of nor was its attention drawn to the terms and conditions which appeared on the reverse of the invoice. Mr. Assure also testified that he had not brought the respondent's attention to the terms and conditions on the reverse of the invoice. *(See King's Car Hire (Pty) Ltd V Wakeling 1970(4) SA 640 (N) at 643 D-F)*

15. It was argued by *Mr. Harms* on behalf of the appellant that a reasonable customer in the position of the respondent would have noticed the terms on the reverse of the invoice and would have enquired about any material terms and conditions or any written statement regarding a warranty. He accordingly submitted that on the *caveat subscriptor* principle and on the authority of *Glen Comeragh (Pty) Ltd V Colibri (Pty) Ltd 1979 (3) SA 210 (T)* the respondent should be held bound to the terms and conditions of the agreement.

16. I have some difficulty with this submission as it is premised upon the assumption that the terms and conditions were contained on the face of the document which the respondent was asked to sign. This is not the case in this matter. Mr. Marais signed the front side of the document and the terms and conditions were contained on the reverse of the document and there was no evidence that at the time of signature he was aware that there were such terms and conditions or that his attention had been brought to the existence of such terms and

conditions. For these reasons this submission is accordingly rejected.

17. In the alternative it was submitted by *Mr. Harms* that should it be found that the respondent was not aware of the existence of the terms and conditions appearing on the reverse side of the invoice, on the approach of the *quasi-mutual assent* the respondent should be regarded as having been bound by the agreement. This approach is to effect that if the supplier has taken such steps as would draw the attention of the reasonable customer to the terms of the supplier, the latter is entitled to assume from the customer's conduct in going ahead with the contract that he has either read and assented to the terms or is prepared to be bound by them without reading them. (*See Sanso Properties Joubert Street (Pty) Ltd V Kudsee 1976(4) SA 761 (A))*

18. It is quite inconceivable that the respondent can be said to have agreed to the terms and conditions which appeared on the

reverse of the invoice when in fact on the evidence of Mr. Assure no attempt was ever made by him to bring Mr. and Mrs. Marais' attention to their existence. In my opinion the *quasi-mutual* assent will have no application in this matter. The mere fact that Mr. Marais was asked to sign the invoice is not enough to indicate that contractual terms were contained therein. On the appellant's evidence, its representative, Mr Assure could not have been under the impression that Mr. Marais was entering into an agreement on the terms contained in the invoice. Even if Mr. Assure was under such an impression, such an impression on his part would have been unreasonable because, on his evidence, he knew that he had not brought Mr. Marais' attention to the terms and conditions appearing on the reverse of the invoice.

19. This brings me to the second question namely whether the choice of the range of product had any effect on the 12 months warranty. There was a dispute between the parties on the duration of the warranty. On the appellant's version the

warranty period was 12 months whereas on the respondent's version was 15 years. I shall decide this issue on the appellant's version and accordingly hold that its product was subject to a 12 months warranty. There is however no evidence to suggest that the parties had agreed that the warranty would be suspended if the product was installed outside the premises.

20. It was also argued by *Mr. Harms* that the mere fact that the steel gates had rust could not in itself constitute a ground upon which the contract could be cancelled. He accordingly submitted that the respondent at most should have sued for damages. I am unable to agree with *Mr. Harms*' contention. A term relating to a guarantee is a material term of the contract as it is intended to protect the purchaser in the event of defects manifesting themselves during the duration of a warranty. Thus in this case if the rust and chipping occur during the period of a guarantee the respondent will be entitled to demand its

enforcement. The appellant's failure and/or refusal to comply with the terms of the warranty would constitute breach of the agreement and the respondent would be entitled to seek cancellation of the agreement and claim restitution.

21. The defects in this matter manifested themselves within some few weeks after installation and they were of the kind covered by the warranty clause. I have already found that on the evidence there is no indication that its operation was limited in terms of either the range of product purchased by the respondent or in terms of where the product was to be installed. The appellant's failure to comply with its contractual obligations in terms of the warranty, namely to supply goods free from latent defects, accordingly constituted a breach of the material term of the contract and which entitled the respondent to cancel the contract and claim payment of the purchase price against the return of the steel gates.

22. In the circumstances I would dismiss the appeal with costs.

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ZONDI, AJ

I agree and it is so ordered.

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DESAI, J