IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

Reportable

CASE NO: A 439/2013

In the matter between:

TRANSNET LIMITED t/a TRANSNET FREIGHT RAIL Appellant

And

S A METAL & MACHINERY CO (PTY) LIMITED Respondent

JUDGMENT: 07 August 2014

DAVIS J

Introduction

[1] This appeal essentially concerns the status of a sale between appellant and respondent of two lots of marine fenders which took place by way of an online auction on 26 November 2009.

[2] Appellant advertised two lots of fenders for sale. One lot consisted of twenty fenders and the other lot consisted of fourteen fenders. Respondent bid for these fenders. As the highest bidder, it was successful and immediately paid the necessary sale price, being R 200 000 for the lot of twenty fenders and a further R 140 000 for the lot of fourteen fenders. The full purchase price amounted to R 445 740, consequent upon the addition to the bid amounts of a buyer's premium of 15% and value added tax.

It was common cause that appellant was unable to deliver all thirty-four fenders. Respondent accepted delivery of fourteen fenders and sued appellant for the delivery of the balance of twenty fenders.

[3] Initially respondent claimed an order directing appellant to deliver to it the balance, namely 9 x 10 m fenders and 11 x 6 m fenders. During the course of the trial, it amended its particulars of claim by seeking an order which defined the criteria which the fenders were required to meet in order to comply with respondent's version of the contract. These fenders had to be inflated, reasonably usable and equipped with nets and transmitters. A transmitter is an item of equipment which is employed to control the pressure inside the fender and which is not visible from outside.

[4] Appellant did not dispute this definition of the contractual criteria. It pleaded, inter alia, that the respondent had refused to collect and remove nine of the fenders that formed part of the contract and which were still available for collection at the Saldanha Bay Harbour. It also undertook to repay respondent R 50000 plus VAT together with the buyer's premium of R 51 000 together with VAT. Later it tendered to deliver fourteen fenders and repay an amount for the remaining six fenders. These tenders notwithstanding, respondent continued to contend that it was entitled to the performance by appellant of its contractual obligations to deliver the full merx.

[5] The core of its argument before the court *a quo* was that it was not liable for respondent's claim because of an agreed exclusion from liability, pursuant to the provisions of Clause 11 of the 'auctioneers terms and conditions'.

[6] This clause reads thus:

> 'All goods are sold "AS IS, WHERE IS, WITH ALL FAULTS AND WITHOUT RECOURSE". Illustrations, pictures or videos posted on the Site are for the convenience of the buyers only.
>
> The Auctioneer and, where applicable, Goindustry DoveBid has used its reasonable endeavours to ensure that the description of each lot(s) appearing on the Site are accurate, but the buyer relies upon such description as its own risk. Buyers should satisfy themselves prior to the sale as to the condition of the lot and should exercise and rely on their judgment as to whether the lot accords with its description at their own risk.
>
> Subject to the obligation accepted by Goindustry DoveBid and, where applicable, the Auctioneer under these Terms and Conditions neither the seller nor Goindustry DoveBid nor, where applicable, the Auctioneer nor any of their respective employees or agents are responsible for errors of description or for the genuineness for authenticity of any lot and no warranty whatever is given by Goindusty DoveBid or, where applicable, the Auctioneer, or their respective employees or agents or the seller to the buyer in respect of any lot and any express or implied conditions or warranties are hereby excluded to the greatest extent permitted by law.'

[7] Before the court *a quo*, appellant contended that the clause was a form of *voetstoots* clause which provided that neither appellant, the auction company nor any of their employees could be held liable for errors of description or for the genuineness or authenticity of either of the two lots which had been sold to respondent.

[8] In his judgment, Blignault J interpreted Clause 11 by drawing a distinction between the description of the merx and the presence or absence of defects. In his view, Clause 11 did not save the appellant from the failure to deliver the merx as that had been advertised. Accordingly, he ordered the appellant to be directed to deliver to respondent 9 x 10 m fenders and 11 x 6 m fenders inflated, reasonably usable with nets and transmitters purchased by plaintiff from defendant on auction on 26 November 2009.

[9] With the leave of the Supreme Court of Appeal, the appeal against the order has come before this court.

Appellant's case

[10] Mr Arendse, who appeared on behalf of the appellant, contended that Clause 11 went beyond a traditional *voetstoots* clause. In his view, the clause included two further provisions, both of which were critical to the disposition of this case. In the first place, the clause provided that a purchaser, such as respondent, was required to satisfy itself prior to the sale as to the condition of the lot and to

exercise its own judgment as to whether the lot, which it had examined, accorded with the description contained in the advertisement. Furthermore, neither the seller, the relevant auctioneer nor the respective employees could be held legally liable for any errors of description or authenticity of the lot which had been advertised.

[11] Accordingly, Mr Arendse insisted that when Mr Barnett, a director of respondent, inspected the fenders on 30 November 2009 and found deflated bags on the ground and not the thirty four fenders that he thought respondent had bought, he should have undertaken this inspection prior to attempting to conclude the contract, or, at the very least, prior to respondent's payment to appellant. In short, Mr Arendse submitted that where a purchaser, such as the respondent, had an opportunity to inspect the property before buying it and nevertheless bought it with patent defects, there was no recourse against the seller. In this connection Mr Arendse relied on **Odendaal v Ferraris** 2009 (4) SA 313 (SCA) at para 35:

> 'As a general rule, where a buyer has an opportunity to inspect the property before buying it, and nevertheless buys it with its patent defects, he or she will have no recourse against the seller. It is apparent\t that the respondent discovered the water damage immediately after taking occupation – and thus that he would have done so had he asked for access at the time of his inspection. He has himself to blame for failing to do so and cannot hold his failure against the appellant.'

Evaluation

[12] Mr Arendse appear to accept that if clause 11 was indeed no more than a *voetstoots* clause, it would have a restricted ambit. As Ogilvie Thompson J (as he then was) said on behalf of a full bench of this Division in **Cockraft v Baxter** 1955 (4) SA 93 (C) at 98 B-C:

> 'There however appears to me to be no sufficient warrant for expanding the ambit of a mere agreement to buy *voetstoots* (without more) beyond its recognised sphere of relieving the vendor from liability for latent defects to the extent of precluding the buyer from relying upon any misrepresentation whatever as to the condition of the article sold. If the vendor wishes to guard himself against all liabilities for all representations as well as for all defects he should, in my opinion, incorporate into the sale an appropriate condition on their behalf.'

[13] Mr Arendse's argument however was that the clause extended beyond the ambit of a *voetstoots* clause set out in **Cockraft v Baxter**, *supra* in that it placed an obligation upon the purchaser, being the respondent, to satisfy itself prior to the sale as to the condition of the lots. Further, as a corollary thereto, the seller could not be held liable for errors of description or for the authenticity of any lot. Hence, the legal classification of clause 11 and its precise legal ambit lay at the heart of the resolution of the present appeal.

[14] Central to the finding of Blignault J was a distinction which the learned judge drew between the description of the merx and the presence or absence of defects. This distinction finds support in **Freddy Hirsch Group (Pty) Ltd v Chicken Land**

(Pty) Ltd 2010 (1) SA 8 (GSJ) at para 41, namely a distinction must be drawn between defects in the goods sold and the seller's failure to perform in terms of the agreement between the parties; that is a failure to deliver the merx as promised in terms of the contract.

[15] In relation to Mr Arendse's attack on the distinction drawn by Blignault J recourse by appellant to **Odendaal**, *supra* is also unhelpful. That case turned on defects, whether latent or patent, in respect of a merx being immovable property which the seller that undertaken to transfer to the purchaser. In particular, the question arose in this case about water damage which the purchaser only discovered after taking occupation but which would have been ascertained earlier had he asked for access to the property for the purpose of his inspection of the property.

[16] In the present case, the question arises as to whether Clause 11 saves the seller, in this case appellant, from delivering that which was the merx as opposed to defects in respect of the merx.

[17] I accept that the clause is hardly the epitome of clarity and that it requires interpretive work in order to give it a reasonable meaning. The key question is whether the reasonable meaning to be given to the clause extends so far beyond a traditional *voetstoots* clause with its accepted scope and can be held plausibly to

amount to the imposition of a condition that only upon inspection of the lots by the purchaser, could the actual merx be determined.

[18] Mr Arendse resisted the suggestion that, on this latter construction, the sale of the lots amounted to a form of lottery, in that a purchaser would not know what it had actually purchased until such time as it inspected the lot, irrespective of the description of the merx in advertisements which in the first place had prompted the purchaser to enter into contractual arrangements with the seller. For example, albeit that the advertisements sought to sell thirty four fenders upon inspection, it may well have turned out that only five fenders were on offer. To that Mr Arendse's response was effectively that until such time as the purchaser has satisfied itself as to the number of fenders on offer, it should not have entered into the contract and, if it so acted, it did so at its own risk.

[19] This interpretation seeks to expand Clause 11 way beyond the traditional *voetstoots* clause, which is manifestly the meaning set out in the first paragraph of Clause 11. This interpretation could also blur the distinction between a merx which is the subject of the contract and defects pertaining to that merx, a distinction which is made apparent in the case law to which I have made reference already. See **Odendaal**, *supra* at para 35-36 and **Freddy Harsch Group (Pty) Ltd**, *supra* at para 41.

[20] It must follow that a reasonable reading of Clause 11 supports the basis of the judgment of Blignault J. To the extent that there were any defects in the lot, Clause 11 might come to assistance of the appellant. But Clause 11 could not constitute a defence to the non-delivery of thirty four fenders as advertised nor that the fenders would not accord at all with the description as set out in the advertisements. An advertisement of an auction clearly has legal significance. See **Shandel v Jacobs and another** 1949 (1) SA 320 (N) at 326. The interpretation as contended for by Mr Arendse would reduce the importance of the advertisement of the lots to no more than a possible but not even probable offer of a particular merx.

[21] To the extent that the argument that the significance of the advertisement is rendered nugatory by Clause 11 has any merit, the pleadings in this case are dispositive. In respondent's amended particulars of claim the following appeared:

> '4.1 Annexure "PC1" to "PC4" were all printed on 10 December 2009, therefore subsequent to the auction having taken place and the marine fenders being sold.
>
> 4.2 For that reason, annexure "PC2" indicates that the bidding had closed and annexure "PC3" indicates that the marine fenders had been sold and what the selling price of each of lot 602 and 603 was.
>
> 4.3 However, save for the various indicates of the way in which the auction process had progressed, these annexures all formed part of the advertisement for the auction from the outset, and the marine fenders as

described and depicted therein constituted the subject matter of the auction and the resultant sale agreement.'

[22] The reference in respondents amended particulars of claim to PC 2 is to the two lots namely of fourteen fenders and twenty fenders to which I have referred earlier. The document PC 3 is of particular significance. It describes the one lot as 10,6 marine fenders (fourteen) inclusive of transmitter and fender nets and the other as 6,5 m marine fenders (twenty) inclusive of transmitter and fender nets. In both cases the document says 'assets sold', in the case of the 10 x 6 m for R 140 000 and in the case of 6 x 5 m for R 200 000.

[23] The defendant's plea responds with a specific paragraph which reads thus:

'9. The terms governing the auction, and thus the basis on which the parties contracted, are the following:

9.1 Annexure "PC 5" to the Particular's of the Plaintiff's Claim ("the auctioneer's terms");

9.2 The terms contained in the participation form, a copy of which participation form is annexed hereto marked "P1"; and

9.3 The general terms and conditions applicable to the use of the auctioneer's website ("the general terms and conditions"), a copy of which general terms and conditions are annexed hereto marked "P2".

10. Save as aforesaid, the contents of this paragraph are admitted.'

[24] When the pleadings of both parties are read together it would appear that, save for a reference to Clause 11 by way of a more general mention of the general auctioneer's terms and conditions, the appellant accepted the balance of respondent's plea. This acceptance included, inter alia, the averment that the two sets of assets, that is the two sets of marine fenders had been sold for R 140 000 and R 200 000 respectively and that both had been sold inclusive of transmitters and fender nets. Thus appellant accepted that the contract included a particular merx which was described clearly in PC3. In other words, the appellant did not place in issue the passage in respondent's particulars of claim that 'the marine fenders as described and depicted therein (PC3) constituted the subject matter of the auction and the consequent result of a sale agreement.

[25] Respondent pleaded that the agreement of sale was subject to the auctioneers terms which are contained in the participation form in the general terms and conditions. This implies clearly, as it admitted the balance of the plea, that respondent did not dispute the *essentialia* of the agreement of sale for neither the participation form nor the general terms and conditions dealt therewith. When the plea is read as a whole, it is clear that what had been agreed between the parties, upon the closure of the pleadings, was that the respondent was the seller and appellant was the purchaser, the sale price was for R 340 000 for the two lots of tenders and that the merx was the 'marine fenders as advertised'.

[26] It is common cause that appellant did not fulfilled these contractual obligations and that it did not delivered the property which conformed substantially

with the contractual description nor I might add to the quantity thereof. For analogous cases see **Fitt v Louw** 1970 (3) SA 73 (T); **Schmidt v Dwyer** 1959 (3) SA 896 (C); **Marais v Commercial General Agency Limited** 1922 TPD 440 at 444-445.

[27] While respondent raised an alternative claim for payment for damages, it was clear, as a result of the evidence of Mr Conradie who testified on behalf of respondent, that there were thirty two marine fenders, fitted with the features contained in the description and depiction of the merx which were currently in use in Saldanha Bay in addition to two fenders available Coega which could be delivered by the appellant to the respondent.

[28] In the result therefore the appeal is dismissed with costs.

DAVIS J

BAARTMAN J and DOLAMO J concurs