

**IN THE HIGH COURT OF SOUTH AFRICA**

**(EASTERN CAPE LOCAL DIVISION, PORT ELIZABETH)**

Case Number: 466/2016

Dates Heard: 17 , 18 , 19 , 22 , 23

and 25 August 2016

Date Delivered: 4 October 2016

In the matter between:

**HVH Transport CC**

**Plaintiff**

and

**Martin Kriel, t/a Supreme Truck & Trailer Spares**

**First Defendant**

**Wesbank, A Division of First Rand Bank Limited**

**Second Defendant**

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**JUDGMENT**

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**MALUSI AJ:**

[1] This is an action for damages arising out of an alleged fraudulent misrepresentation. The action is defended only by the first defendant. The second defendant did not participate in the case. When I refer to the defendant in this judgment it must be understood to be reference to the first defendant.

[2] A vast amount of evidence was either common cause or not disputed. For a better appreciation of the issues I intend to set out this evidence before providing an analysis.

[3] The plaintiff is a close corporation whose core business is haulage of goods utilising trucks and trailers. During November 2011 it concluded a contract of sale with CJ partners an entity involved in transport business. The conclusion of this contract necessitated that the plaintiff must purchase a super link tautliner trailers.

[4] During the trial I was presented with photographs depicting the trailers. A super link is a combination of two trailers pulled together at the

same time by a truck tractor. The front trailer is usually six metres long with an underslung chassis protruding at the rear. The front trailer axles are located under this protruding chassis. On top of the axles is attached a coupling mechanism known as a “fifth wheel”. The rear trailer is usually 12 metres long. It has an overhang at the front. Underneath the overhang is the safety pin which attaches the rear trailer to the fifth wheel. A tautliner is a trailer with a head board (front) and tail board (rear) usually the same height as the truck tractor or even taller. The edges on both sides of the trailer have tarpaulin canvass curtain. The curtain is attached to the roof of the trailer by a railing and to the deck of the trailer by straps.

[5] The managing member of the plaintiff, Hendrick Vorster (“Vorster”), instructed the plaintiff’s agent, Pieter Vorster (Pieter”), to source trailers for the plaintiff. Pieter reported to Vorster that the defendant was selling the trailers.

[6] The defendant is a sole proprietor trading as Supreme Truck and Trailer Spares primarily retailing truck and trailer spares for the last 14

years. He had purchased the trailers during March 2011 from TSE Big Max (“TSE”) a Johannesburg based company. TSE had in turn procured the trailers from their manufacturer, UBT. It is UBT which placed a false vehicle identification number (VIN) on the rear trailer. They also allowed their business associate to use the rear trailer in his transport business. The defendant knew the trailers to have been manufactured in 2011. He converted them to tautliners from being flatdeck trailers. He used them from March 2011 to December 2011.

[7] There is dispute about the time but it is common cause that Vorster twice visited the defendant’s premises to view the trailers. On inspection the trailers appeared to be freshly painted and bore temporary permits as they had not yet been licensed.

[8] The defendant made some representations to Vorster which led to the plaintiff purchasing the trailers. The purchase agreement provided that the plaintiff would pay a deposit of 10% of the purchase price in the sum of R36 480,00. The balance in the sum of R328 320,00 was

financed by the second defendant. The plaintiff took delivery of the trailers on 11 January 2012.

- [9] When the trailers were used during the first trimester of the year 2012, they manifested significant mechanical problems. Vorster and his son inspected them during January 2013 when they observed cracks on the chassis. They approached the defendant who told them to obtain an expert report. R. Arnold (“Arnold”) of Eales & Meyers loss adjusters inspected the trailers on 31 January 2013. He found significant damage inconsistent with the purported year of manufacture. On the rear trailer he discovered that the VIN on the manufacturer’s plate differed to that stamped on the chassis. On 5 March 2013 the plaintiff’s insurer declined insurance cover for the trailers. On 17 February 2014 plaintiff initiated this action against the defendant.

- [10] The plaintiff’s particulars of claim asserted that the true state of affairs of the trailers which was allegedly misrepresented by the defendant was the following:

*“11.1.1 the year of manufacture was 2009,*

- 11.1.2      *the trailer was registered to be a flatbed unit,*
- 11.1.3      *the trailer was modified and reconditioned to be a tautliner unit,*
- 11.1.4      *the trailer was not a demonstration model, but manifested damage consistent with excessive use and overloading over a long period of time”.*

Additionally, in respect of only the rear trailer it was asserted that:

- “11.2.4      *The VIN number was false, as the correct VIN number as stamped in the trailer was in fact AA9H232AM9AKM 1725”*

[11] The plaintiff asserted that at the material time the defendant deliberately remained silent regarding the true state of affairs of the trailers and that alternatively, third party service providers acting on his behalf, had taken steps to conceal it despite an obligation to disclose to plaintiff.

[12] It was alleged the omission to disclose was a breach of the defendant's obligation and /or the material representation constituted a material misrepresentation

[13] In his plea the defendant asserted that at the time of the agreement he was not aware of the trailer's true age; not aware of the false VIN on the 12 metre trailer; had informed Vorster of the conversion of the trailers to tautliners; had never represented the trailers as demonstration models; had informed Vorster that he had used the trailers and delayed registering them until 2012; denied that the trailers manifested damage, it occurred after delivery to plaintiff; he did not market the trailers for sale.

[14] The requirements to prove fraudulent misrepresentation are trite in our law<sup>1</sup>. The onus is the ordinary civil onus though fraud will not be lightly inferred.<sup>2</sup> If cancellation is claimed restitution must be tendered.

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<sup>1</sup> Ruto Flower Mills (Pty) Ltd v Moriates 1957 (3) SA 112 (T)

<sup>2</sup> *Gilbey Distillers v Vintners (Pty) Ltd v Morris* N.O 1990 (2) SA 217 (SE )at 226A

[15] Mr Gajjar , who appeared on behalf of the defendant, submitted that on a conspectus of all the available evidence it is clear that the defendant did not know the true year of manufacture of the trailers, the prior use before taking delivery from TSE and the false VIN on the rear trailer.

[16] I find merit in the submission. It appears from the evidence that it was Arnold's inspection on 31 January 2013 that revealed the false VIN. It was the further investigation by the police that led to UBT who disclosed the true year of manufacture and the history of the trailer. There is no evidence whatsoever from which it can be inferred that the defendant knew. A court is not allowed to engage in conjecture and speculation.

[17] During the trial it was common cause that the trailers were registered as flatdeck units and they had been modified and reconditioned to be tautliner units. Vosrter testified that these facts were never disclosed to him by the defendant. The defendant's evidence is that full disclosure was made to Vorster.



[18] The two versions are mutually destructive and cannot be reconciled. It has been held that where there are two mutually destructive versions, the court must be satisfied upon adequate, sound and substantial grounds that the plaintiff's version is true and the other is false<sup>3</sup>. The correct approach in resolving factual disputes of this nature is settled law.<sup>4</sup>

[19] Vorster's uncontested evidence is that at the time of concluding the agreement he requested the defendant to provide him with a copy of the registration certificates for the trailers. The defendant failed to handover the copies to Vorster for no apparent reason. The probability is that he wanted to conceal that the trailers were registered as a flatdeck.

[20] Vorster's evidence was not disputed when he said a converted tautliner was probably worth a quarter of the price of a new one. Yet, he paid the defendant R30,000.00 more than the price of a new tautliner.

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<sup>3</sup> National Employers Mutual General Insurance Association v Gary 1931 AD 187 at 199

<sup>4</sup> (SFW Group Ltd & Another v Martell et Cie & others 2003 (1) SA 11 at para 5; National Employer's General Insurance v Jagers 1984 (4) 432 (ECD) at 440 D-G

Vorster gave the impression that he was an astute businessman. I do not believe he would have paid the inflated price if the defendant had told him the tautliners were converted. The probabilities favour his version that he was told that the tautliner was new and had only been used once. That is why he paid a premium.

[21] The defendant insisted that as Vorster was experienced with tautliners he ought to have seen that the trailers were converted. This is strange from a person who says he never inspected the trailers from the time he bought them until he sold them. If he never inspected them I can not understand how he can say Vorster ought to have seen the conversion.

[22] The defendant denied saying to Vorster the trailers were demonstration models in the sense of having been used once since new. He gave evidence of extensive use transporting spares over a period of months. But the probabilities indicate he must have told Vorster they were used once. Pieter, the plaintiff's agent, deposed to an affidavit and stated he told Vorster "... *there is a new superlink trailer that according to the owner was used only once by Supreme Trade & Trailer.*" (own

emphasis) The defendant admitted Pieter spoke to him enquiring about the trailers. The second defendant's schedule describes the trailers as "demo". They could only have obtained this information from the defendant as it is common cause he provided the particulars of the trailers to the second defendant.

[23] Vorster's evidence indicates that there were serious problems with the trailers when they used them. The back trailer was higher than the front trailer; the chassis in the area of the fifth wheel were touching each other; the backboard of the front trailer was touching the frontboard of the rear trailer; some tyres on the back trailer were getting worn quickly. Defendant simply distanced himself from all these problems. He had never inspected the trailers. His driver had never reported any problems which is highly improbable. He never noticed the anomaly on the registration documents of the trailers. I got the impression he tailored his evidence to meet the case confronting him.

[24] Vorster was an impressive witness. His demeanor indicated that he was truthful. I had granted him permission to be seated while testifying due

to his advanced age and he had been slightly unwell. On a few occasions he rose to his feet when refuting the defendant's version such was his conviction. He had a clear recall of material aspects despite his age. I am alive to his latent bias as he is a member of plaintiff but I gained the distinct impression he was truthful.

[25] The defendant was a poor witness. He was evasive in his answers and claimed not to recall simple things like the colour of the trailers when he purchased them. He was untruthful on many peripheral issues let alone the material aspects. I gained the distinct impression his evidence was fabricated to answer the case against him. I have no hesitation in rejecting his evidence as false.

[26] In my view the defendant's omission to disclose the true state of affairs and misrepresentation were intended for Vorster to act upon them. He later concluded a contract on behalf of plaintiff with the defendant. Vorster repeatedly stated he would not have concluded the contract if he knew the true state of affairs. All the other requirements are likewise fulfilled. There can be no doubt the defendant knew the

representations were false. I have already made a finding that a representation was made and the content thereof. I am satisfied all the requirements for the fraudulent misrepresented were established by plaintiff.

[27] Mr Jooste, who appeared for the plaintiff implored me to award costs on a punitive scale as a mark of displeasure at defendant's conduct. Mr Gajjar submitted that costs should follow the result. The defendant's conduct is totally unacceptable from a person conducting business with members of the public. The plaintiff will be awarded an amount substantially less than it claimed. In the exercise of my discretion I believe it is just and fair for costs to be awarded on a party and party scale.

[28] It is trite that the plaintiff ought to be put in the same position it would have been if it had not entered into the contract. The plaintiff claimed under four heads of damages. The plaintiff claimed the deposit paid in the sum of R36 480,00 as well as the licensing fees in the sum of R52 595.20 paid for the trailers. I am of the view that the plaintiff is entitled

to have these amounts reimbursed. The parties ventilated the issue of the amount paid for the license fees during the trial. The balance of the purchase price including additional financial charges was agreed and amended to R 237 901,78. The fourth head of damages was conceded not to have been proved by Mr Jooste. The concession was proper. I relied heavily on Counsel regarding the calculation of the total sum awarded.

[29] In the circumstances it is ordered that:

- i) the first defendant pays the plaintiff the sum of R326 976,98 as and for damages,**
- ii) the first defendant pays interest on the aforesaid amount at the legal rate from 18 February 2014 to date of payment,**
- iii) the trailers, having VIN Numbers AA9H232AM9AKM1764 AND AA9H232AM9AKM1725, may be collected by the first defendant within 14 (fourteen) days from the granting of this order from wherever the plaintiff may point them out to be ;**

- iv) should the trailers be collected by the first defendant as set out above, the plaintiff shall procure that the original registration certificates relating to them together with all such documentation as may be necessary to enable the first defendant to register the trailers in his name, which documentation shall be duly executed, is delivered to the first defendant together with the trailers.
- v) the defendant pays the plaintiff's costs of suit.

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**T. MALUSI**

**ACTING JUDGE OF THE HIGH COURT**

On behalf of the plaintiff: Adv Jooste  
Instructed by: Greyvensteins  
Port Elizabeth

On behalf of the first defendant: Adv Gajjar  
Instructed by: BLC Attorneys  
Port Elizabeth