

IN THE HIGH COURT OF SOUTH AFRICA  
(TRANSVAAL PROVINCIAL DIVISION)

Date: 18/02/2008  
Case No: 35635/2002

UNREPORTABLE

In the matter between:

FRANCOIS NATHAN WILSON

Plaintiff

And

S. G. (GLEN) MA THEWS

Defendant

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JUDGEMENT

LEDWABA J

INTRODUCTION

[1] The plaintiff in this matter claimed a refund of R214 000 from the defendant plus interest and he tenders to return the vehicle delivered to him by defendant. The claim is based on an alleged breach of two contracts of sale by the defendant. Plaintiff further claimed an amount of R 12 844 plus interest, being the damages suffered by the plaintiff as a result of the defendant's alleged breach of contract.

[2] Defendant, in his plea, challenged the *locus standi* of the plaintiff, however it became clear during the hearing that *locus standi* of plaintiff was not disputed and defendant conceded that plaintiff has the

necessary authority to institute this action. The identity of defendant is not an issue anymore.

[3] Defendant admitted that two agreements were entered into, however, the parties agreed that the sale of the two vehicles would be regarded as one composite agreement and the plaintiff was liable to pay plaintiff R255 420 for the two vehicles.

[4] I pause to state that the amount alleged by the defendant was reduced to R250 420 after defendant's counsel, Mr. Louw, during re-examination of defendant applied for an amendment. The application for amendment was not opposed. Defendant further denied that he is liable to pay the plaintiff any damages.

[5] The plaintiff testified and called one witness, Mr Johan Lebe (Mr Lebe), as an expert witness. After the close of the plaintiff's case, the defendant's counsel, Mr Louw, made an application for absolution from instance which application was dismissed. Defendant also testified and called witnesses Mr. Isaac S. F. Koen (Mr. Koen) to testify.

[6] The undermentioned information and facts are common cause between the parties:

- 6.1 During November 2001 the parties entered into a contract of sale which was partly written and partly oral in terms whereof the defendant was to manufacture the so called 'buffalo vehicle', (herein after referred to as 'the first vehicle'), and plaintiff would pay defendant R125 000. (The issue of whether the VAT was included or excluded in the amount will be dealt with later).
- 6.2 Towards the end" of November 2001 or beginning of December 2001 the parties further agreed that defendant would build up another 'buffalo vehicle', (hereinafter referred to as 'the second vehicle'), and would sell it to plaintiff for an amount of R90 000.
- 6.3 In respect of the first vehicle, the parties agreed that in addition to the aforesaid purchase price:
- (i) an air conditioning costing R28 500 would be fitted in the first vehicle and the fitting expenses thereof would be R5 000.
  - (ii) defendant was to fit retread tyres on the first vehicle for an additional R3420.
  - (iii) defendant informed plaintiff that additional part(s) were to

be added to the steering wheel column for an extra amount. Plaintiff said defendant informed him that the costs of the said parts on the steering wheel were about R2 000 and each party would contribute an amount of R1 000. On the contrary, the defendant alleged that the costs of the extra parts to be put on the steering wheel column were about R 14 000 made up as follows; R10 000 for two angle drives and R4000 for four universal joints. Defendant further alleged that plaintiff was to contribute R7 000 but he refused. Plaintiff's refusal to contribute caused defendant to fit only one angle drive.

- [7] The first vehicle was delivered to plaintiff on 17 May 2002. The second vehicle has not yet been delivered to plaintiff when this trial was heard.
- [8] Plaintiff had deposited R214 000 into a banking account given to him by defendant and defendant acknowledged receipt of the said amount.
- [9] The plaintiff alleged that there are two separate contracts of sale for the first vehicle and the second vehicle. The defendant alleged that the parties entered into a single contract in respect with the two vehicles and the total amount for the two vehicles was R250 420. The

defendant's defence, that the plaintiff owed him the "balance of R41 400, 20 and he tendered delivery of the second vehicle on receipt of the said balance.

- [10] The plaintiff stated that the balance in respect of the two separate contracts should be calculated on the basis that the amount paid to the defendant should be deducted from the sum total of purchase price of the first and the second vehicle being R266 000.

#### PLAINTIFF'S EVIDENCE

- [11] Plaintiff testified that in the year 2001 he had been a tour guide for about four years and was operating under the name 'Rockface Outdoors'. He was a member of an organisation called Field Guides of South Africa. He used to transport tourists mainly in the National Parks.
- [12] Because of the nature of his business, he needed what he referred to as a 'buffalo army build-up vehicle' to transport his clients. As he was shopping around he was introduced to defendant by a friend in about November 2001. Thereafter, he went to meet defendant at his house in Johannesburg where he was exhilarated when he saw a 'buffalo build-up vehicle' which belonged to defendant. The said vehicle could accommodate eight passengers. He informed defendant that he wanted a similar vehicle which could accommodate twelve passengers

in its cab and one passenger at the front. As they were busy with discussions, defendant switched-on the engine of the vehicle. The manner in which plaintiff was impressed by the vehicle he did not even deem it necessary to test drive the said vehicle.

- [13] Negotiations regarding the construction of the vehicle and the selling price thereof commenced and they agreed that further negotiations would be finalised later. In about mid-November 2001 defendant sent a quotation to the plaintiff, the contents of which read as follows:

*'Kwotasie vir ombou van Unimog:*

1. *Kajuit soos bespreek, met sitplek vir bestuurder en 13 passasiers.*
2. *Vlekvrye staal diesel tenk.*
3. *Vier aluminium koste aan onderstel vasgesit.*
4. *Alle elektriese bedrading word nut oor gedoen.*
5. *Alle ligte, flicker ligter en agter ligte word nut oorgedoen.*
6. *Die kajuit vloer word rubber uit gevoer.*
7. *Verf werk buite en "stone chip" aan kajuit.*
8. *Nuwe ruitveërs.*
9. *Skruiфvensters so os bespreek.*

*Prys R125 000 btw uitgesluit.*

*Deposito 35% betaalbaar voor met kajuit begin word.*

*Bankbesonderhede: Mnr. S. G. Matthews*

*Standard Bank*

*021785449*

*By voorlaat dank.*

*Ons hoop om 'n goeie produk binne kort aan u te lewe.'*

[14] Towards the end of November 2001 he responded to the said quotation was as follows:

*'Beste Glen*

*Ek het gisteraand by die huis/kantoor aangekom. So nou ons 'n kans slag behoorlik kommunikeer.*

*Dankie vir die kwotasie wast jy deurgestuur het. Ek wil net graag die volgende punte aanraak, party waarvan ons met my gesukkel met opvangs in die Oos-Kaap berge aangerak het.*

1. *Die kajuit en bak agter: Ons sal per sitplekke en beenpasie 80cm toelaat. As ek dit dan reg het laat dit ons met 'n bak gedeelte van ook 1 m.*

*Die bak sal so os jou voorbeeld wees maar net korter? Plaas ons die spaarwiel regop in die bak? Is die 80cm dan genoeg of moet die stoele sal na buite oopgaan soda tons tentpale ensdaar kan sit.*

2. *Dakluik: Maak jy voorsiening 'n dakluik?*

3. *Alluminium kaste: Ons sal graag die voorste 2 kaste wil*

*gebruik om stoele in te vervoe. Sal kaste van 62 x 50 x 45(H) cm daar kan inkom?*

4. *Padwaardigheid: Soos by jou bespreek verkry ons die voertuig met 'n RWC.*
5. *Aircon: Sal 'n VW Kombi-tipe aircon nie moontlik werk nie?*

*As dit so is, sal dit nie minder plek in beslag neem as ander nie? Parke is bekommerd dat ons nie hoer sal gaan as die voorbeeld se gewone dak nie. Dus sonder die dakrak op doe voorbeeld. As ons 'n ander eenheid moet posit, waar pas ons dit in? Wat sal die koste van die sisteme wees?*

6. *Tenks: Hoeveel liter brandstof hou die tenk?*

*Glen, ek plaas vanoggend die fondse oor. Die kwotasiefaks het egter 'n bietjie getrek. Bevestig asseblief dat die rekeningno soos volg is: 021785449.*

*Baie dankie vir alles tot dusver.*

*ROCKFACE OUTDOORS*

*Per: Frans Wilson November 25 2001.'*

[15] Plaintiff in his evidence further commented about his handwritten notes



on the quotations and I will deal with the handwritten notes later in my judgement.

[16] He further testified that he later contacted the defendant concerning the installation of air-conditioning on the first vehicle. He needed an air-conditioning because when he discussed with his colleagues the type of the vehicle that he has ordered, they advised him that the vehicle would be more impressive if he could install an air-condition system in it.

[17] He emphatically further testified that he discussed the issue of roadworthiness of the first vehicle with the defendant because he wanted his clients to be covered by the insurance which he would arrange to cover the tourists he would be transporting. He further explained that he needed a vehicle with a roadworthy certificate because he would be operating same on a public road when he picks up his clients from the airport to transport them to the National Parks.

[18] He further said that in mid December 2001 the defendant in furnishing him with a progress report, informed him that a cab had been put on the chassis. A gearbox was needed on the steering wheel mechanism because the cab had to be moved forward. He further said he specifically asked the defendant if it would be legal and acceptable if

the cab was moved forward and the defendant's answer was in the affirmative.

[19] In their discussion concerning the gearbox, the defendant informed him that he wanted an extra R2000 for the gearbox and he objected thereto, however they ultimately agreed that he would contribute R1 000 for the said gearbox. He further testified that he made notes of the said telephone conversation concerning the gearbox and confirmed that such notes are the handwritten notes at the bottom of page 10 of bundle B.

[20] He further testified that they originally agreed that the first vehicle was to be delivered on the first week of January 2002, however, the vehicle was not delivered because the air-condition had not yet been fitted. They regularly contacted each other by telephone and during the course of their telephone conversations they agreed that they would meet in Cape Town in February 2002 when the defendant was to attending an auction where army vehicles were sold.

[21] When they met in February 2002 the defendant also informed him that he was going to buy about 120 to 150 used army vehicles. They then finalised their discussions regarding the air condition. He further informed the defendant that he wanted the invoices for the

transactions. The defendant undertook to furnish him with the invoices.

[22] He further said that during their meeting he categorically informed the defendant that he would need the first vehicle to transport his clients on 21 May 2002 and he needed delivery of the vehicle in the first week of April 2002. Defendant informed him that both vehicles would be delivered to him in April 2002 and delivery would take place at Port Elizabeth or Cape Town.

[23] In the first week of April 2002 he went to Sudan to conduct other businesses. When he was in Sudan he informed his wife to communicate with the defendant concerning the delivery of the first vehicle. When returned from Sudan on 15 May 2002 the first vehicle had not yet been delivered. He then contacted the defendant again and the defendant informed him that the vehicle would be loaded on the low back truck and would be delivered on the 17 May 2002. He agreed to accept delivery of the vehicle without the air-conditioning because it was during winter season. Indeed the vehicle was delivered on the said date and he was excited when delivery took place. His excitement was short lived when he started the engine of the first vehicle because after starting it, its revolutions were not regular. He then immediately phoned the defendant to inform him about the problem and the problem was sorted out telephonically.

[24] When he drove the vehicle he experienced some problem with the steering-wheel mechanism because it did not turn swiftly and according to his evidence the steering-wheel was (*'Hakerig'*). He phoned the defendant again and told him that in his view the vehicle was not safe to be driven and that he would therefore not be transporting his clients with it.

[25] When he raised the issue of the roadworthy certificate of the vehicle, the defendant told him to punch-in some numbers on the chassis of the vehicle so that registration of the vehicle could be effected. He was not impressed by what defendant told him. Ultimately, the defendant told him that he should go to the licensing department and speak to a certain lady who would furnish him with a temporary registration document of the vehicle. Defendant further told him he would send him a roadworthy certificate by courier on the 20 May 2002.

[26] Since the vehicle was not roadworthy to accommodate his clients, he had to hire two vehicles to transport his clients on 21 May 2002. In explaining his damages, he said he paid R1 000 for an extra driver for the vehicle that he hired, it costed him R6 600 to return the vehicle to Kempton Park, and he paid R5 244 to hire two vehicles. The total damages claimed were R12 844. He testified that he did not have any

document to support his claim for damages.

- [27] He further testified that he thought that the defendant was registered with the Receiver of revenue to collect VAT' and the price that defendant charged for both vehicles included VAT.

#### EVIDENCE OF PLAINTIFF'S WITNESS

- [28] Mr. Johan Lubbe was the plaintiff's expert witness. He testified that he is a forensic expert and also gave evidence about his training and experience. I am not going to repeat what he said in that regard.

- [29] Basically his evidence dealt mainly with whether the first vehicle was roadworthy and if it could be registered by the licensing department or not.

- [30] He started by explaining the contents of the Certificate Registration on page 44 of bundle A. In summarising his evidence, he said that the engine number and chasis number reflected on the Certificate of Registration are the numbers of a new vehicle which was initially registered on 1 January 1976 and was registered in the name of the Department of Defence on 15 April 2002. He further said before the certificate of registration is issued there must be a roadworthy certificate to confirm that the vehicle in question was roadworthy before

a registration certificate can be issued.

[31] He compared the Certificate of Registration with the Certificate of Roadworthiness in page 43 of bundle A. He noted that the engine number and chassis number in the said two documents were the same; however, the vehicle descriptions of the vehicle described in the two certificates were different. He further commented that Certificate of Roadworthiness that was issued on 16 May 2002 by the Cleveland testing station. It is important to interpose and mention that since the Certificate of Roadworthiness was issued on 16 May 2002, the defendant arranged same before the first vehicle was delivered to the plaintiff and before the plaintiff raised the issue of the roadworthy certificate with him on 17 May 2002.

[32] He further said when the certificate of roadworthiness is issued the vehicle which is inspected should be physically present and be properly inspected. He clearly testified that when he inspected the vehicle delivered to plaintiff by defendant he could not trace the engine number and chassis number matching the numbers of the engine and chassis numbers on the Certificate of Roadworthiness and Certificate of Registration.

[33] He further said the first vehicle was not roadworthy because, *inter alia*,

it had no reflectors and reflecting tape on the sides, indicators were not clearly visible, the rear window did not have the mark 'EMERGENCY EXIT', the steering wheel and gearbox were not properly fitted. He therefore concluded that the Certificate of Roadworthiness was issued fraudulently.

#### DEFENDANT'S EVIDENCE

[34] The defendant in his evidence confirmed that in November 2001 he was contacted by plaintiff who wanted to purchase two 'buffalo vehicles'. He was in the business of buying ex-military vehicles, stripping, re-building and selling them. He further said Stannic recognised the vehicles he rebuilt and even financed them. He confirmed that when the plaintiff saw his vehicle he was impressed and placed an order for a similar vehicle to be built for him as he intended transporting tourists in National Parks.

[35] He confirmed that plaintiff gave him the specifications of the vehicle he should build and further told him that the vehicle was to be roadworthy to transport passengers. He denied that he undertook to take the vehicle to a testing station for a roadworthy certificate to be issued because the process was a problematic and long. In January 2002 plaintiff did mention that his clients were to be transported from the airport to the National Parks.

[36] He said his business was not registered for VAT and he was not charging VAT on his prices. He testified in detail about the problems he experienced in manufacturing the vehicle according to the plaintiff's specifications, I do not think it necessary to repeat the details. He said the total contract price in respect of the two vehicles was R255 4200 and plaintiff had already paid R214 000. He confirmed that he sent the Certificate of Roadworthiness by courier to plaintiff and it was delivered on 17 may 2002.

[37] He testified in detail about the problem of obtaining a roadworthy certificate and the problems of registering the vehicles he used to be built. He confirmed that when he organised the Certificate of Roadworthiness for the first vehicle, it was not inspected at the testing station.

[38] During cross-examination he confirmed that the original agreement between him and plaintiff was that he would sell the first vehicle to plaintiff for R125 000, excluding VAT and plaintiff was to pay a deposit of 35% of the purchase price. He further confirmed that the sale of the second vehicle was agreed upon, on about the 1ih December 2001 as per the quotation attached on page 69 of bundle A.



[39] He further stated in his evidence that the aforesaid two agreements were combined to be one sale transaction and the two vehicles were to be delivered at the same time. He denied that he agreed to furnish plaintiff with the Certificate of Roadworthiness. He did not deny his discussion with plaintiff about the roadworthy certificate. .He further said he told plaintiff that he knew a person who could organise a temporary registration certificate. He agreed that he arranged for the roadworthy certificate to be issued and he knew that such certificate was issued in an illegal manner.

#### DEFENDANT'S WITNESS

[40] Defendant called Mr. Koen as his witness. He testified that he was a police officer for about thirty years and worked at the office dealing with the clearance of vehicles. He explained in detail the procedures taken in registering army vehicles and problems encountered especially if the said vehicle does not have the engine number and the chassis number.

[41] During cross-examination he said he did assist defendant to register the army vehicles that he built and sold. Defendant wanted to call a witness to "testify about the cost of an angle drive; since the witness was not available he closed his case.

#### EVALUATION OF THE EVIDENCE

[42] To a large extent the parties agree that two contracts of sale were concluded. According to defendant, the parties agreed that the said contracts would be regarded as one contract. On the contrary, the plaintiff denies that the two agreements were to be regarded as a single contract.

[43] The defendant denies that he breached the agreement and regards plaintiff's conduct of cancelling the contracts in respect of the first and second vehicle as a repudiation on the part of the plaintiff. Defendant further rejected the tender of the plaintiff and made a counter-tender of the second vehicle to the plaintiff should plaintiff pay the balance of R4 420.

[44] The argument by defendant's counsel that the contract(s) between the parties should be classified as *location conduction operis* is rejected outright. The plaintiff did not instruct defendant to render services.

[45] The pleadings and the evidence before the court overwhelmingly supports the notion that contracts between the parties should be regarded as contracts of sale because defendant promised to deliver the two vehicles and plaintiff promised to pay a certain price.

[46] Except for what is alleged by defendant that the two agreements were

later regarded by the parties as one agreement, there is no sufficient evidence before me to support that the two agreements were recognised as one agreement. The contracts were concluded on different dates and were in respect of separate items and the price of each item is identifiable and can be quantified.

[47] Now in my view, the nub of this case is whether the defendant breached the contracts and if the contracts were legally cancelled by the plaintiff.

[48] I will first deal with second vehicle. In respect of the second vehicle plaintiff alleged that defendant failed to deliver same. It is common cause that the second vehicle was not delivered to the plaintiff. The tender by defendant to deliver same on receipt of R41 420 was only by defendant after plaintiff informed the defendant in writing that he was cancelling the contract in respect of the second vehicle.

[49] Regarding the first vehicle plaintiff raised five points that the defendant failed to do, viz, that:

- (i) defendant failed to deliver the vehicle which was roadworthy.
- (ii) defendant failed to deliver the vehicle which could be used for the purpose it was intended for.
- (iii) Defendant could not guarantee plaintiff against eviction.

(iv) defendant failed to deliver the vehicle timeously.

[50] I will first deal with the last three alleged failure or breaches alleged by plaintiff.

[51] The vendor (defendant) has a legal duty *of* guaranteeing the purchaser against eviction, that is, to protect the buyer's possession, see *Lammers and Lammers v Giavannoni* 1955 (3) SA 385 (A). This duty applies unless the parties have excluded it from the contract sale.

[52] There is no evidence that defendant could not be approached if there was any eviction. Most importantly the plaintiff in this case has not been evicted.

[53] The parties by agreement extended the delivery date. This cannot, in my view, be a valid ground for cancelling the contract. Failure to deliver VAT invoices cannot, in my view, be a valid ground for cancellation. The defendant testified that his business had not registered for VAT.

[54] I will deal with the last two remaining grounds alleged by plaintiff together. On page 10 of bundle B, plaintiff mentioned roadworthiness '*Padwaardigheid*', of the vehicle as an important aspect which the

parties discussed. Defendant alleged that the issue of roadworthiness of the vehicle was not discussed and he would not agree to obtain a Certificate of Roadworthiness for plaintiff because the process was complicated and time consuming. However, the irony is that the defendant used his money to obtain a Certificate of Roadworthiness and involved himself in an unlawful deal to secure a document which, he alleged, was not promised to the plaintiff.

[55] In my view, plaintiff's witness Mr, Johan Lubbe has furnished the court with enough reasons why the vehicle could not be regarded as being roadworthy.

[56] The plaintiff was a credible witness and same cannot be said about the defendant. Defendant failed to answer questions honestly and in a direct manner.

[57] The defendant knew very well the purpose for which the plaintiff intended using the vehicle for and that the passengers were to be insured. This is a clear indication that the vehicle had to be roadworthy. The manner in which the defendant went to the extremes to obtain the Certificate of Roadworthiness, in my view, supports the plaintiff's allegation that the defendant had to furnish him with the roadworthy certificate. For the aforesaid reasons the plaintiff was entitled to cancel

the contracts. The defendant's breach of contract was, in my view, material.

[58] The dispute between the parties, which are not in my view, relevant for the determining of the case, were narrowed down. It is common cause that plaintiff paid defendant R214 000.

[59] It is clear that the plaintiff did not prove the damages he allegedly as a result of the defendant's breach of the contracts, the claim for damages cannot succeed.

[60] I therefore make the following order:

1. Defendant is ordered to pay an amount of R214 000.
2. Plaintiff to return the first vehicle to defendant and to deliver it at 69 Jopie Fourie Street, Meyerton in Vereeniging.
3. Defendant to pay interest at 15.5% from 16 July 2002 to date of payment.
4. Defendant is ordered to pay the costs which costs shall include the costs of the plaintiff's expert and all the reserved costs.

A. P. LEDWABA  
JUDGE OF THE HIGH COURT

Date of hearing: 22 May 2007  
Counsel for Plaintiff: P. Nel  
Instructed by: Schnetler & Associates  
Counsel for Defendant: D. A. Louw  
Instructed by: Hack Stupel & Ross