REPORTABLE

Case Number : 429 / 98

IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

In the matter between

NIEMESH SINGH **Appellant**

and

McCARTHY RETAIL LTD (t/a McINTOSH MOTORS) **Respondent**

Composition of the Court : **Olivier, Scott JJA and Mthiyane AJA**

Date of hearing : **25 August 2000**

Date of delivery : **14 September 2000**

SUMMARY

Contract - malperformance - right of rescission - test - value judgment of Court.

J U D G M E N T

PJJ OLIVIER

OLIVIER JA

[1] In February 1996 and at Pinetown the respondent sold to the appellant a new 1996 model Mercedes Benz E 320 A Sportline motor vehicle in terms of a written contract. Respondent did not have the required vehicle in stock at Pinetown, but could obtain one from a motor dealer in King Williams Town. It was agreed that the vehicle would be delivered to the appellant at Durban, at the respondent's expense. In due course the vehicle was delivered to the appellant at Durban, and he honoured his side of the bargain.

[2] In order to effect delivery at Durban, the respondent arranged for the vehicle to be driven under its own power from King Williams Town to Durban. It was driven with its odometer disconnected, so that when it was delivered to the Appellant, its odometer indicated a kilometre reading of 160, instead of the true 920. The appellant was unaware that the vehicle had thus been driven.

[3] The appellant's case in the court *a quo* was that what he bought was a new vehicle and not one which had been driven from King Williams Town to Durban. He alleged that the respondent was made aware of the appellant's wishes in this regard and had in fact agreed that the vehicle would be brought to Durban by road transportation carrier. The respondent, so the appellant averred, thus committed a breach of contract entitling the latter to rescission and restitutionary relief.

[4] As far as the breach of contract is concerned, the appellant alleged that the written contract of sale did not correctly record all the terms agreed upon between the parties in that it does not record a term which was formulated by the appellant as follows:

> "Defendants (now respondent) will source the vehicle from another dealer in King Williams Town in the Cape Province and the vehicle will be brought to Durban by road transportation carrier."

Appellant claimed, firstly, rectification of the written contract to include the above term. He based the allegation of a breach of the contract by the respondent squarely on the facts mentioned above and written contract as rectified.

[5] The appellant further claimed rescission of the contract and restitiutionary relief. He based his entitlement to recission on alternative grounds: firstly, that the respondent breached the contract in a material respect; and secondly, on an implied *lex commissoria*.

[6] The court *a quo*

(i) upheld the appellant's claim for rectification as set out above;

(ii) found that the respondent had breached the contract as rectified, by having the vehicle driven under its own power from King Williams Town to Durban instead of having it conveyed by motor carrier transportation;

(iii) rejected the appellant's claim that the said breach was of such a fundamental nature as to justify his rescission of the contract;

(iv) rejected the appellant's claim that the parties had agreed tacitly to a *lex commissoria*;

(v) in the result, granted absolution of the instance with costs; and

(vi) later granted leave to the appellant to appeal against the said judgment to this Court.

[7] The following facts are not in dispute:

(a) That the parties entered into a written contract for the sale of the

motor vehicle at Durban on 8 February 1996.

(b) That the written contract contained the following terms:

"8 I [the purchaser] agree that the vehicle is new, notwithstanding -

8.1 that it may have been driven under its own power with or without the distance travelled having been recorded on the odometer -

8.1.1 from the plant where it was assembled to the place of delivery; or
8.1.2 for demonstration purposes; or
8.1.3 for pre-delivery testing;

8.2 that it may have sustained minor damage in the course of 8.1."

(c) That the vehicle was driven under its own power from King Williams Town to Durban and during that time its odometer was disconnected.

(d) That the vehicle was so driven without the appellant's knowledge or consent.

(e) That the appellant only became aware that the vehicle was driven as described above after it was delivered to him and as a result of him noticing minor damage or defects in the vehicle, caused by the said driving.

The claim for rectification

[8] The appellant bears the burden to prove, on a balance of probabilities,

either an antecendent or contemporaneous agreement or a common continuing intention of the parties, in respect of the alleged term, which was mistakenly not reflected or correctly reflected in the written document. This is trite law.

[9] In this Court, the respondent expressed disagreement with the finding of the court *a quo* that the appellant's claim for rectification is to be upheld. It was not argued on behalf of the respondent that the judge *a quo* misdirected himself or that he applied a wrong legal principle or test in respect of the rectification issue. It was, however, suggested that the learned judge had made a wrong finding on the factual issue as to whether the parties had agreed on the clause quoted above.

[10] In the light of the conclusion to which I have come in respect of the appellant's right to cancel the contract, it is not necessary to deal with the rectification issue at all. I will assume, in favour of the appellant that the court *a quo* correctly found in his favour that the contract stands to be corrected as alleged by him. It follows from this that we must proceed on the basis that the

respondent committed a breach of the contract by having the car driven from King Williams Town to Durban , instead of transporting it by carrier.

Cancellation of the contract

[11] The crucial question is whether the appellant was entitled to cancel the contract because of such breach, either because the breach was material, or because the parties had tacitly agreed on a *lex commissoria* entitling the appellant to cancel if the contract is breached as aforesaid.

[12] The right of a party to a contract to cancel it on account of malperformance by the other party, in the absence of a *lex commissoria* depends on whether or not the breach, objectively evaluated, is so serious as to justify cancellation by the innocent party.

[13] When is a breach, in the form of malperformance, so serious that it justifies cancellation by the innocent party? Van der Merwe *et al* (***Contract, General Principles*** 1 ed 1993, at 255) summarises the position as follows, with reference to decided cases and various writers:

> "The test for seriousness has been expressed in a variety of ways, for example that the breach must go to the root of the contract, must affect a vital part or term of the contract, or must relate to a material or essential term of the contract, or that there must have been a substantial failure to perform. It has been said that the question whether a breach would justify cancellation is a matter of judicial discretion. In more general terms the test can be expressed as whether the breach is so serious that it would not be reasonable to expect that the creditor should retain the defective performance and be satisfied with damages to supplement the malperformance."

[14] As long ago as 1949 it was said by this Court in ***Aucamp v Morton*** 1949 (3) SA 611 (A) at 619 with regard to the relevant question, that it was not possible to find a simple general principle which can be applied as a test in all cases, because contracts and breaches of contract take so many forms. In deciding, in that case, whether the respondent was entitled to cancel the contract, the Court said (at 620)

> " ... nor were the obligations which were broken so vital or material to the performance of the whole contract that respondent could say that the foundation of the contract was destroyed."

[15] I perceive the correct approach to be as follows : The test, whether

the innocent party is entitled to cancel the contract because of malperformance by the other, in the absence of a *lex commissoria*, entails a value judgment by the Court. It is, essentially, a balancing of competing interests - that of the innocent party claiming rescission and that of the party who committed the breach. The ultimate criterion must be one of treating both parties, under the circumstances, fairly, bearing in mind that rescission, rather than specific performance or damages, is the more radical remedy. Is the breach so serious that it is fair to allow the innocent party to cancel the contract and undo all its consequences?

[16] Approaching the matter from this broad perspective, I am of the view that the breach of the contract by the respondent does not justify rescission of the contract. It is true that the appellant wished to buy the Mercedes delivered to him in Durban, as a new car. He was adamant that it should be transported by road carrier. But if one analyses the evidence, the matter becomes more opaque. The appellant suggested to Reddy that if the

respondent could not deliver the Mercedes by carrier, it must pay his air fare to King Williams Town and he would drive it back to Durban at their expense. The true implication of this scheme was that he would drive the car to Durban as agent of the respondent, and true delivery would take place in Durban. His real complaint, therefore, was not that the car was driven from King Williams Town to Durban, but that it was not driven by himself. The appellant relied on this solitary fact; he did not rely on any substantial damage to the vehicle due to its having been driven as explained. The breach**,** in this form, does not justify rescission.

[17] The appellant also relied on a tacit *lex commissoria*, *i.e.* that the parties tacitly entered into an agreement that should the contract be breached, the appellant would be entitled to cancellation. A tacit term is

> " ... an unexpressed provision of the contract which derives from the common intention of the parties, as inferred by the Court from the express terms of the contract and the surrounding circumstances."

See Corbett AJA in ***Alfred McAlpine v Son (Pty) Ltd v Transvaal Provincial***

Administration 1974 (3) SA 506 (A) at 531 H.

[18] The contract in this case makes no provision for a right of cancellation in favour of the purchaser under any circumstances. And it is impossible to find, on a preponderance of probabilities, and applying the officious bystander test, that both parties would have agreed to a *lex commissoria* in respect of the breach now under discussion.

[19] In the result, the appeal cannot succeed.

The following order is made :

The appeal is dismissed with costs.

P J J OLIVIER JA

CONCURRING :

SCOTT JA
MTHIYANE AJA