THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable

Case No: 260/2017

In the matter between:

STU DAVIDSON AND SONS (PTY) LTD **APPELLANT**

and

EASTERN CAPE MOTORS (PTY) LTD **RESPONDENT**

Neutral citation: *Stu Davidson v Eastern Cape Motors* (260/2017) [2018] ZASCA 26 (23 March 2018)

Coram: Lewis, Ponnan and Seriti JJA and Pillay and Schippers AJJA

Heard: 22 February 2018

Delivered: 23 March 2018

Summary: Damages for breach of warranty – 'substantial/major' accident affecting resale of motor vehicle. Terms of warranty clear.

Special leave – test for – requires something more than reasonable prospects of success on appeal. Ultimately court hearing appeal decides whether special circumstances exist. No special circumstances found – appeal struck from the roll with costs.

ORDER

On appeal from: Eastern Cape Division of the High Court, Port Elizabeth (Rugunanan AJ and Pickering J sitting as court of appeal):

The appeal is struck from the roll with costs.

JUDGMENT

Lewis JA (Ponnan and Seriti JJA and Schippers AJA concurring)

[1] The litigation between the parties in this matter started in the Regional Court, Port Elizabeth. The appellant, Eastern Cape Motors (Pty) Ltd (Motors), sued the respondent, Stu Davidson and Sons (Pty) Ltd (Davidson), for damages for breach of a warranty made in a contract for the sale of a Volkswagen Transporter motor vehicle (the vehicle) by Davidson as a trade-in, when the latter purchased a Ford Ranger vehicle from Motors. The price for the vehicle paid by Motors was some R245 000. Motors also claimed costs incurred in attempting in its turn to sell the vehicle. Davidson counterclaimed for rectification of the trade-in declaration.

[2] The regional court dismissed the claims and did not deal with the counterclaim for rectification. On appeal to the full bench of the Eastern Cape Division of the High Court, Grahamstown, the appeal court (Rugunanan AJ, Pickering J concurring) found that Davidson had breached a clear warranty in the trade-in declaration attached to the agreement of sale. It ordered that Davidson pay R95 000 to Motors as damages for breach of the warranty but dismissed the claim for the costs associated with trying to sell the vehicle subsequent to the trade-in. The issue of rectification was not traversed save in so far as Davidson contended for a

very wide interpretation of the trade-in declaration which was not supported by the evidence and rejected by the appeal court.

[3] Davidson appeals against the decision of the full bench with the special leave of this court. This court will not interfere with a decision of the full court only because it considers it to be wrong. What is required, in addition, is some additional factor or criterion (*Westinghouse Brake & Equipment (Pty) Ltd v Bilger Engineering (Pty) Ltd* 1986 (2) SA 555 (A) at 561E-F). The fact that leave to appeal has been granted upon application to the President of this court is not decisive of that enquiry. It remains for the court upon a consideration of the appeal to make that determination. I shall deal first, however, with the background to the contract of sale, its terms, and then with whether the warranty was breached.

[4] Davidson regularly bought vehicles from Motors. In November 2012, Mr Patrick Davidson (Patrick) bought a new vehicle from Motors, a Ford Ranger, and offered the vehicle in question as a trade-in to Motor's representative, Mr C Pommerel. Pommerel agreed to pay R245 000, and prepared a written agreement of sale. This comprised an 'offer to purchase' in respect of the new vehicle bought by Davidson, 'special conditions of offer to purchase' and a 'trade-in declaration'.

[5] The special conditions related to both parties' rights and obligations in respect of the trade-in. Clause 7 stated, inter alia, that the vehicle was sold 'voetstoots'. Clause 12, which is presumed to refer to Davidson, stated that the vehicle was warranted to be the sole property of Davidson, that the date of first registration was correctly reflected, that the odometer reading was correct, and that 'the trade-in vehicle offered in this agreement has not been involved in any accident'.

[6] It is not clear why this provision was not amended, because Patrick had in fact advised Pommerel that the vehicle had been involved in a collision, and Pommerel had seen pictures of the vehicle which showed at least cosmetic damage to it.

[7] The trade-in declaration, on the other hand, contained the following clause, which is at the heart of the dispute. It read 'I /we warrant and declare that: The vehicle has not been involved in a substantial/major accident (particularly if it will affect resale value).' It was dated 3 December 2012.

[8] Motors claimed damages for breach of this warranty on the basis that had it known that the vehicle had been involved in a major accident it would not have purchased it, or would have paid only R150 000. The damages claimed, and awarded by the full bench, amounted to the difference between what Motors had paid for the vehicle, and what it eventually sold it for – R95 000.

[9] It transpired after the sale was concluded and Motors tried to sell it that it had indeed been involved in a major accident, such that the manufacturer, Volkswagen, had written off the vehicle and that the Volkswagen warranty on it had been cancelled despite the vehicle being sold new only a year previously. Motors claimed in the alternative for damages in delict, but it is not necessary, in view of the conclusion to which I come, to deal with the delictual claim.

[10] The evidence before the regional court established that Prestige Auto Body Repairers, run by a Mr Stols (who gave expert evidence at the trial), had provided a written quotation to repair the vehicle for R261 946, on 17 April 2012 – some months before Davidson sold it to Motors. Stols testified that it had been involved in a major accident, and that the repairs required were extensive. This evidence was not gainsaid.

[11] It was also established that Davidson had in fact itself bought the vehicle (together with a number of others) from a body shop, Plastic Rebuilders, for R130 000. Mr Nicholas Davidson (Nicholas) had made these purchases and had seen to the repair of the vehicle in the Davidson workshop. Davidson had spent about R60 000 (possibly R70 000) on parts in order to repair the vehicle, and the

repair itself had taken some four to six weeks, although Davidson employees had not worked on it continuously.

[12] It is thus clear that the vehicle had been involved in a major collision. And that it substantially affected resale value was shown by the evidence led as to Pommerel's futile attempts to resell it to other dealers. He eventually succeeded in selling it to a Mr C Hechter for R150 000. That was quite a high price in the circumstances since the evidence of another dealer, also not gainsaid, was that where a manufacturer's warranty was cancelled one could sell a vehicle for only half its book value, which would have been R130 000.

[13] Hechter testified that had he realized the extent of the damage he would not have paid R150 000 for the vehicle. He spent a considerable sum of money repairing it and eventually sold it at a profit.

[14] The evidence before the regional magistrate thus established without any doubt that the vehicle had been involved in a major collision before the trade-in, and that the resale value was substantially affected. What is disputed is whether the statement in the trade-in declaration amounted to a warranty. Davidson argues that it is too vague to be enforceable as a contractual term. And indeed the regional magistrate had considered that the statement was merely one of opinion.

[15] That was clearly wrong. The statement formed part of a warranty termed as such in the declaration. Warranties are binding terms of a contract. This proposition is so trite that no authority is required to establish it. And it is not vague – the term in the contract clearly indicates that a substantial or major accident is one that affects resale value. Since Motors had established that the vehicle had been involved in a major accident, and that resale value was indeed affected, that should have been the end of the matter.

[16] However, it was argued that the contract should have been rectified since it did not reflect the common continuing intention of the parties. Davidson had, as I have said, counterclaimed for rectification of the contract so as to delete the two warranty clauses in the conditions of sale and in the trade-in declaration, and to include a clause reading:

'The Transporter has been involved in an accident. Eastern Cape Motors shall undertake its own investigation into the accident to determine whether the Transporter may be traded in or not.'

[17] The regional magistrate did not consider the counterclaim and the evidence certainly did not support the claim for rectification. In any event, Davidson did not pursue a cross-appeal in respect of the claim for rectification, and there is no evidence that supports Patrick's limited evidence that Pommerel had undertaken to investigate the extent of the damage to the vehicle himself.

[18] In the circumstances, there is no merit in the appeal to this court. That brings me to the question posed earlier in this judgment: That two judges of this court gave special leave to appeal does not mean that we are not required to consider whether we actually should be entertaining the appeal at all: *National Union of Mineworkers v Samancor Ltd* [2011] ZASCA 74 para 15. The normal criterion of reasonable prospects of success applies to both 'special leave' and 'leave' (*Westinghouse* at 561E-F). Given that there is no merit at all in the appeal, there are no reasonable prospects of success, much less special circumstances.

[19] Here, the amount in issue is minimal. There is no legal question to be determined. There is no factual dispute that requires reconsideration. There is no reason why an appellate court should determine any matter arising from the first appeal further. Again, it is trite that where there has been no manifest denial of justice, no important issue of law to be determined, and the matter is not of special significance to the parties, and certainly not of any importance to the public

generally, special leave should not be granted. (See *Westinghouse* above and *National Union of Metalworkers of South Africa & others v Fry's Metals (Pty) Ltd* [2005] ZASCA 39).

[20] As the matter fails to meet the threshold set for special leave, the appeal should be struck from the roll.

[21] The appeal is struck from the roll with costs.

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C H Lewis

Judge of Appeal

Pillay D AJA (concurring separately)

[22] Two issues arise in this appeal. First, has the appellant shown that it did not breach a warranty relating to its resale of a motor vehicle to the respondent? Second, – a question the court raised – has the appellant shown special circumstances to justify granting special leave to this court? Only if the first question is answered in favour of the appellant will the second question arise.

[23] By way of background, on 23 November 2012 the respondent, a car dealership purchased a 2012 VW Transporter T5 motor vehicle from the appellant. Mr P Davidson who represented the appellant informed Mr C W Pommerel, a car salesman for the respondent, that the vehicle had been involved in an accident from which it sustained damage. Taking account of its newness as a 2012 model, its low odometer reading of 5 400 km, its general external appearance and the appellant's representations that the accident was 'not bad' or 'minor', the respondent settled on the purchase price of R245 000 for the vehicle.

[24] The respondent attempted unsuccessfully to resell the vehicle. Eventually Mr Pommerel asked Mr F McCloud, a dealer in pre-owned motor vehicles, to list the vehicle on his online auction website. At Mr McCloud's request, Mr Pommerel ascertained the vehicle's history from the Volkswagen Group South Africa (VW), the manufacturers of the vehicle. From this history it emerged that VW had terminated its maintenance plan and warranty effectively from 5 June 2012; VW had written off the vehicle because of the damage it had sustained in an accident.

[25] No clarity was forthcoming from Mr Davidson about exactly what damage the vehicle had sustained. Eventually the respondent sold it. Then it instituted action for the difference of R95 000 between the purchase price of R245 000 and the R150 000 it recovered on resale. Its claim was founded on the breach of the warranty in clause 7 of the trade-in declaration that read:

'The vehicle has not been involved in a substantial/major accident (particularly if it will affect resale value).'

[26] In the trial court the material facts to determine whether the damage to the vehicle had been substantial became common cause. That VW wrote off the vehicle and withdrew its warranty went uncontested. This fact alone showed conclusively that the damage to the vehicle had been substantial. Accordingly, the appellant had no prospects of success on appeal. But this is not all. The summary below of the evidence from witnesses for both parties proved that the appellant had breached the warranty.

[27] The evidence of the expert witness Mr Stoltz that the visible damage to the vehicle amounted to some R261 946 was challenged only to the limited extent that damage to the gearbox was superficial. Irrespective, and even if the cost of the gearbox in the amount of R77 438 were deducted, the balance of the cost of repairs, and accordingly the damage, was substantial.

[28] Fearing that if it delayed the sale into the next year, the vehicle would be valued as an older model, the respondent hastened to sell it, but did so at a loss of R95 000, thus proving that the damage affected its resale value. The uncontested evidence of Mr McCloud that vehicles without a manufacturer's warranty attracted no

more than half their trade-in value was further proof that the damage was substantial.

[29] Mr Hechter, who purchased the vehicle, testified for the appellant that if he had known of the accident damage he would not have paid R150 000 when he bought it from the respondent. He resold it for R212 000 with a two-year warranty after he had repaired it. Notwithstanding the repairs and the insurance, this price was still lower than the R245 000 that the respondent had paid, another indication that major accident damage affected the resale value of the vehicle.

[30] Mr N Davidson, representing the respondent had rebuilt the vehicle. He must have known that the damage was major from both his observations and the price he paid for it. He had paid R130 000 for the vehicle in the very year of its manufacture when its book value was double the price. Spending another R70 000 in parts alone excluding labour costs amounted to more than half the price that he had paid for it. Mr P Davidson's concession that the cost of R261 000 for the repairs would be for major damage settled the dispute about the scale of the damage to the vehicle.

[31] On appeal, the appellant conceded that the damage was substantial but denied that it had breached the warranty. It contended that the phrase 'a substantial/major accident' is incapable of 'any objective meaning in the circumstances, and is accordingly invalid due to vagueness.' It persisted that the trade-in declaration did not capture the intention of the parties. Pertinently to the warranty in clause 7, the appellant contended that the parties had arranged that the respondent would investigate the accident first before determining whether it would accept the vehicle as a trade-in. As the full bench had not considered this factor, the appellant submitted that this Court should intervene to reverse its decision.

[32] Despite the importance of the alleged agreement to inspect the vehicle before concluding the purchase, the appellant abandoned its counter-claim for rectification of their agreement to this effect. It did not attempt to resurrect its counter-claim by cross-appealing; inevitably this ground of appeal is dead in the water. Contrary to the submission for the appellant, the warranty is not vague or incapable of meaning; manifestly the appellant warranted that the vehicle had not been involved in a major

accident. It breached the warranty; consequently, the respondent was entitled to succeed in its claim.

[33] As to the question whether special leave to appeal should be granted, against the overwhelming weight of evidence that the appellant had shown no prospects of success whatsoever, its counsel sensibly conceded that it had also not shown special circumstances. This concession disposes of the appeal.

[34] In conclusion, I emphasise that merely granting an application for special leave to appeal on petition is not decisive of the question as to whether special circumstances exist. The two judges considering petitions do not usually have the full record of the proceedings in the court below. A full picture of the case sometimes emerges only at the hearing of the special appeal. Ultimately the court considering the appeal decides the question of special leave. Hence I concur with the majority to strike the matter from the roll with costs.

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D Pillay

Acting Judge of Appeal

APPEARANCES

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