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**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
<u>27/3/18</u>
DATE	SIGNATURE

Case No: A175/2017

In the matter between:

IMPERIAL SELECT

Appellant

And

EDUARDO JORGE DA SILVA

1ST RESPONDENT

ABEGAO PINTO

MOTOR FINANCE CORPORATION

2ND RESPONDENT

Coram: Maumela J and Rangata AJ

JUDGMENT

INTRODUCTION

[1] This is an appeal against the whole judgment of the regional magistrate, Mr D Makhoba, of Pretoria Regional Court granted on 08th July 2013. At the commencement of the appeal, the appellant made an application for condonation of the late filing of the appeal. The application was unopposed and was granted.

BACKGROUND

[2] The appellant, Imperial Select and the 1st respondent, Mr Eduardo Jorge Da Silva Abegao Pinto, entered into a verbal sale agreement wherein the appellant sold a Tata Safari motor vehicle (motor vehicle) to the respondent, financed by the 2nd respondent, Motor Finance Corporation. It was an explicit term of the agreement that the motor vehicle shall be provided with a warranty which will be activated from date of purchase. It is common cause that the motor vehicle is as described in the particulars of claim.

[3] After taking delivery of the motor vehicle, the first respondent reported to the appellant certain non-conformities experienced on the motor vehicle which the appellant undertook to fix. Despite the confirmation by the appellant that the non-conformities were attended to; the motor vehicle broke down necessitating repairs to the value of R76 965.31. SA Warranties (motor vehicle warranty provider) indicated that the damage will not be covered by warranty and that the damage is a consequential damage. The first respondent instituted legal proceedings for the cancellation of the said agreement and that the appellant pay an amount of R130 399.97 to the respondent and the order was granted.

[4] The Appellant averred that the regional magistrate misdirected himself on the following issues:

(a) **That the first respondent made an election to abide by the agreement which amounted to a waiver of his right to cancel the contract.**

(i) The appellant relies on the fact that the first respondent by enforcing his rights, delivering the motor vehicle to the appellant for the non-conformities to be fixed was an election to enforce the agreement. The appellant averred that the right to cancel the contract lapses once the party who is entitled to rescind fails to do so within a reasonable time or such person loses the right to rescind if his conduct and the circumstances are such that the defaulting party could reasonably infer that he did not intend exercising his rights to rescind. In this case it is the appellant's case that the first respondent showed by his conduct an

unequivocal intention to enforce the agreement by submitting non-conformance list to the appellant to be replaced.

(ii) The first respondent averred that he did not waive his right to cancel the contract. Further that waiver as averred by the appellant remained incomplete until accepted by the first respondent. He further averred that the appellant cannot rely on the defence of waiver without pleading such defence. Further that the appellant failed to demonstrate to the court that the respondent had full knowledge of the abandoned right. The first respondent averred he at no stage intended to waive his right to cancel the contract.

(b) **Reliance on the Consumer Protection Act 68 Of 2008 (CPA)**

The appellant averred that without pleading reliance on the CPA by the first respondent, the regional magistrate found that the respondent made out a case in terms of the CPA. In response, the first respondent averred that the regional magistrate merely made reference to the fact that the plaintiff (first respondent) had duly complied with the provisions of the said Act, as such does not place reliance thereon.

(c) **The mechanical defects to the water pump was as a result of a latent defect in the engine .**

(i) The appellant averred that the first respondent drove the motor vehicle for 13 000 kilometres before it broke down. Further that according to Mr Carel Johannes Stefaanis Riekert, (appellant's) expert witness stated in his report that, "the motor vehicle was in good working order at the time the cambelt was replaced and that if the water pump was faulty then, it would have been replaced....".

The expert further reported that had there been fault with the water pump, the cambelt would have snapped within the first 1000km after it was replaced.

(ii) The first respondent averred that the motor vehicle had a latent defect on the water pump at the time of sale and this was not known to him. He averred that according to Mr Andre Van Rooyen, the defendant (appellant's) expert witness, his inspection of the motor vehicle revealed that the main shaft or bearing appears to have failed which caused lots of play on the drive pulley. The expert further reported signs that the coolant had been leaking from the bearing. It is his conclusion that the damage to the motor vehicle was as a direct result of the water pump failure which led to the timing belt failure, damaging the pistons and valves. The respondent averred that when he experienced problems with the vehicle he

submitted the list of non-conformities to the appellant to be fixed and the problems were persistent.

(d) **The mechanical defects in the vehicle were serious latent defects of which the first respondent was not aware of when he concluded the contract with the applicant.**

The appellant averred that the motor vehicle had no latent defects at the time of the sale. The first respondent averred that the motor vehicle had defects to the water pump as detailed by Mr Van Rooyen in his report. The expert witnesses agree that the motor vehicle would not have travelled further than 1000 kilometres with a defective water pump. Further that the first respondent had travelled for an approximate distance of 13 000 kilometres before the vehicle's engine broke down. This aspect will be dealt with in detail herein below.

THE ISSUES

[5] The court has to deal with the issues indicated below:

- (a) Did the first respondent waive his right to cancel the contract when he submitted the motor vehicle to the appellant to be repaired.
- (b) Was the defect on the motor vehicle present at the time of the conclusion of the contract.

THE LAW

[6] Ntsebeza AJ in the case of Miller and another NNO v Dannecker 2001 (1) SA 928 (C) at 936 C stated that: "*Waiver is the deliberate abandonment, renunciation or surrender of an existing legal right by the right holder, acting with full knowledge of the right*".

In the case of the Road Accident Fund v Mothupi, Nienaber AJ¹, "*put it clear that waiver is a matter of intention. It is simply put as a unilateral decision not to avail oneself of a right or remedy, privilege or power, an interest or benefit*". Further, Innes CJ² held that when the renunciation though not communicated, is evidenced by conduct inconsistent with the enforcement of the right or clearly showing an intention to surrender it, then also the intention be acted upon and the right perishes. Like any other term of the contract, should a party thereof, intend to waive his or her right, the intention has to be clear, and appreciated

¹ Road accident fund V Mothupi(2003)3All SA181(A)

² Mutual life insurance Co of new York V Ingle 1910 TPD 540 at 550

by the party intending to exercise his right to waive. Such intention has to be communicated to the other party.

[7] In the case of *Sandown Travel (Pty) Ltd v Cricket South Africa* 2013(2) SA 502, Wepener J, held that *"while, ordinarily, a party had to choose which remedy to pursue on breach by the other of a contract and was bound by the choice, there is authority for the view that the innocent party could change that election after giving the party in breach the opportunity to perform. If he or she persisted in the repudiation, thus failing to repent, the innocent party could change his or her election and choose to treat the contract as at an end"*.

[8] In applying the principle indicated above, in the case of *Primat Construction CC v Nelson Mandela Metropolitan Municipality* (1075/2016) [2017] ZASCA73; 2017 (5) SA (SCA) (1 June 2017) Lowe J held that *"in order for the aggrieved party to change his or her election, there had to be a further act of repudiation after the election had been made. Only then could a new election be made"*

ANALYSIS

[9] The first respondent in submitting the list of problems to be attended to by the Appellant, which in any event did not make a difference as the motor vehicle broke down after it was fixed, was considered by the appellant as a waiver of rights by the respondent. The appellant contends that the respondent is not entitled to cancel the contract. The appellant submitted that the first respondent had the opportunity to cancel the contract if he was not happy with the motor vehicle. Instead he elected to enforce the contract and demanded that the appellant fix the non-conformities. It further submitted that the respondent had the opportunity to return the motor vehicle upon the first encounter, wherein he experienced problems:

[10] The first respondent submitted that he had no intention to abandon his right to cancel the contract. When he experienced problems with the vehicle he submitted a list of non-conformities, hoping that the appellant would fix them. He submitted that when the motor vehicle returned from the appellant he still experienced the same problems until the motor vehicle broke down on the highway. The first respondent submitted the findings by Mr Van Rooyen that the breakdown of the motor vehicle was caused by the collapsed water pump

which then caused the failure of the timing belt which in turn led to the damage to the engine.

[11] The onus of proving waiver is on the party alleging it. In this case the first respondent submitted a list of non-conformities, after which the motor vehicle was recalled for repairs. The repairs performed did not assist in fixing the motor vehicle as the breakdown pursued. Taking into account the events that led to the breakdown of the vehicle, the applicable legislation as to the right of the party to a contract, wherein the subject matter had defects that were not known to the buyer, the question will be, was the seller aware of the defect? From the report by the appellant's expert witness, it is clear that the motor vehicle had problems with the water pump. It is recorded that the water pump was replaced at 21397 Km, due to water leakage from the shaft seal. It will be unfair to accept that by bringing to the attention of the appellant the problems that the first respondent experienced on the motor vehicle, with the hope that they will be fixed should be viewed as waiver of ones' rights.

[12] The court views that the first respondent did not at any stage intend to waive his right to cancel the contract and such intention could not be bilateral. The court therefore finds that the respondent had no intention to waive his rights. As such he is entitled to cancel the contract.

[13] The second aspect to deal with is that the regional court found that the first respondent in its action made out a case in terms of the CPA. This aspect shall not be dealt with in detail as it is conceded by the first respondent that the judgment was not founded on the enforcement of the CPA, but on the common law action redhibitoria.

[14] The other aspect to be dealt with is whether the defect to the water pump was a result of a latent defect in the engine itself. It is the respondent's submission that the breakdown was caused by the defective water pump which led to the failure of the timing belt resulting in the damage to the engine. Mr Andre Van Rooyen, pointed out that his examination of the motor vehicle revealed that the main shaft or bearing appears to have failed which has caused a lot of play.

[15] The appellant submitted that at the time of the sale the motor vehicle was in a good working order and contends the submission that the defects were present at that time. Having considered the problems which the first respondent experienced from the time he bought the vehicle, and his insistence for the appellant to make right the cause of the complaints that he submitted, is an indication that the motor vehicle was not free of

problems. For the appellant to simply say that when the motor vehicle was checked, it had no defect could not be correct.

[16] In the case of *De Vries v Wholesale Cars and another* 1986 (2) SA 22 (OPA), the following was stated, *"The question which has to be answered in considering the issue whether the latent defect in the merx is serious enough for a successful reliance on the actio redhibitoria, is whether the defect(s) is or are so serious that a purchaser would not have bought had he been aware thereof on conclusion of the contract. In determining the question whether the purchaser would have bought or not, an objective test should be applied. The ipse dixit of the purchaser is not decisive."*

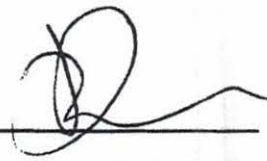
[17] Reference is therefore made to the case of *Du Plessis v West* [1998] JOL 202 (N) at para 5, wherein Combrinck J stated that:

"Where the purchaser chooses to pursue redress by way of the actio redhibitoria he will, in addition, have to show that, had he known about the defect in the res vendita, he would not have entered into the sale and also that he is willing and able to effect restitution of the res, or is excused therefrom. Whilst there is a subjective element to the buyer's assertion that he would not have entered into the sale if he had been aware of the defect that must notwithstanding be objectively sustainable. At the end of the day the court must be satisfied on all the evidence that a reasonable man in the buyer's shoes would have held a similar view."

[18] It is therefore my view that the latent defect was serious to the extent that had the first respondent known of it prior to the sale, he would not have proceeded with the sale of the motor vehicle. As submitted by the first respondent, functionality of the water pump at the time of the sale does not take away the possibility that there could have been a fault on the part. The court agrees with the decision by the regional magistrate that the mechanical defects in the motor vehicle were serious latent defects of which the first respondent was not aware when he concluded the contract with the appellant.

[19] Accordingly, I propose the following order:

- (a) The appeal is dismissed with cost



B Rangata

Acting Judge of the High Court Gauteng, Pretoria

It is so ordered



Maumela T.A.

Judge of the North Gauteng High Court, Pretoria