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AD 7/1/2015

RD 7/1/2015



IN THE HIGH COURT OF BOTSWANA HELD AT LOBATSE

CVHLB-000495-10

In the matter between:

VICTOR LETLHOGELA MAKEPE

Plaintiff

and

**BROADHURST EXECUTIVE MOTORS (PTY) LTD
CHANA MOTORS (BOTSWANA) (PTY) LTD**

**Defendant
3rd Party**

Mr. Attorney L. Makgane for the Plaintiff
Ms. Attorney T. Kebabile for the Defendant

JUDGMENT

RANOWANE J:

INTRODUCTION

1. The plaintiff has instituted an action against the defendants in respect of which he seeks judgment as follows:-
 - a) Declaring the sale agreement between the parties validly cancelled in August 2009;
 - b) Payment of the sum of P129 950.00 or a replacement motor vehicle of the same value;

- c) In the event of payment interest thereon at 14.5% per annum, which is the rate plaintiff is charged by the bank alternatively interest at the rate of 10% per annum calculated from August 2009;
- d) Costs of the suit;
- e) Further and/or alternative relief.

BACKGROUND

- 2. On the 24th June 2009, Victor Makepe, the plaintiff herein and the defendant entered into an agreement of sale in terms of which the defendant sold to the plaintiff a supposedly brand new Xinkai 2.2 motor vehicle registration number B 996 API for the purchase price of P129 950.00.
- 3. The plaintiff duly paid the defendant and took delivery of the motor vehicle. He was informed that for servicing of the motor vehicle as well as any necessary repairs he was to take it to Chana Motors (Botswana) Pty Ltd.
- 4. Soon after the plaintiff took delivery of the vehicle he started experiencing serious problems with it as it had many latent defects manifested by the following:-
 - a) Before the first service, the bearings had to be changed because they were defective;

- b) Different panels of the vehicles kept falling off and needed to be replaced;
 - c) The electronic windows kept malfunctioning continually and had to be repaired;
 - d) In August of the same year i.e. two months after buying the vehicle, whilst the plaintiff was driving around Gaborone, the wheels of the vehicle stopped turning. On inspection it was discovered that the belts in the engine had snapped, thus causing the engine to cease.
5. After this incident, the plaintiff cancelled the agreement and returned the vehicle to the defendant. This was because although the vehicle was sold as new, it had serious latent defects which rendered it unfit for the purpose for which it was bought.
6. When the plaintiff bought this vehicle he did so through a loan from Barclays Bank which charged him interest thereon at the rate of 14.5% per annum.
7. When he returned the vehicle, the plaintiff demanded that he be refunded the purchase price or be given a replacement vehicle of the same value or make. The defendant refused to do any of the things he demanded.

8. The sales manager of the defendant one Surti Mohammed gave evidence for the defendant. He admitted that the plaintiff did purchase the vehicle from their garage but that at the time of the sale, he was advised that the vehicle's repairs and warranty services were the responsibility of Chana Motors (Botswana) (Pty) Ltd and not the defendant.
9. The plaintiff was informed that the vehicle's repairs as well as matters touching on the vehicle warranty should be brought to the attention of the said Chana Motors (Botswana) (Pty) Ltd.
10. The defendant's case is that he was only an agent of Chana Motors and was responsible for the sale of the plaintiff's motor vehicle and no more. The defendant was therefore not in position to confirm nor deny latent defects in the vehicle and for that reason denied any liability to the plaintiff as claimed or in any other manner.

ISSUES

11. The parties in this case have, acting in terms of Order 42 Rule 8 of the Rules of this court, filed a case management report in which issues for determination were identified.
12. These were as follows:-
 - a) Whether the plaintiff's car suffered from the alleged latent defects;

- b) Whether the alleged defects rendered the vehicle unfit for the purpose for which it was purchased;
 - c) Whether the plaintiff was advised that the third party was responsible for services and repairs.
13. I propose to deal with these issues before proceeding to consider the issues of law.
14. The plaintiff's evidence with regard to the latent defects of the motor vehicle sold to him was fairly straightforward. It was not really disputed by the defendant even though the plaintiff was subjected to a fairly long cross examination.
15. The plaintiff told this court the problems he experience with the vehicle, namely that before the first service, its bearings had to be changed because they were defective, different panels of the vehicle kept falling off, windows malfunctioned and had to be repeatedly repaired and finally that within 2 months of it being bought, its wheels stopped turning, the engine belts snapped and the engine ceased.
16. These in my opinion are a clear manifestation of serious latent defects which rendered the vehicle unfit for the purposes for which it was bought.

17. I find that there is overwhelming evidence that the plaintiff's vehicle suffered latent defects which made it entirely unsuitable for the purpose for which it was bought.
18. The next issue to determine is whether the plaintiff was advised that the third party was responsible for services and repairs.
19. In his evidence during cross-examination, the plaintiff admitted that when he bought the vehicle, he was told that it would be serviced at Chana Motors. Also, when it started giving him problems, he was referred to Chana Motors who attended to it. This goes to show that the plaintiff knew that the third party was responsible for service. This therefore answers in the affirmative the final factual issue of whether or not the plaintiff was advised that the third party was responsible for services and repairs.

THE LAW

20. The seller is under an obligation to deliver the thing sold without any defects. If the thing sold is patently defective, the buyer has a choice of either accepting the thing sold despite its defects or rejecting it.

21. But if the defects are latent i.e. where the defects cannot be readily observed by, or cannot be obvious to the buyer then the buyer has special remedy available to him known as *actio redhibitoria*.
22. Latent defects “connotes an abnormal quality or attribute which destroys or substantially impairs the utility of effectiveness of the res vendita (the thing sold), for the purpose for which it has been sold or for which it is commonly used ...and a defect is latent if it is not apparent to the ordinary man even if apparent to the expert.” (See, Gibson South African Merchantile & Company Law (Juta) 8th Ed. p129).
23. In **BONANG v MOTSUMI** 2007 (3) BLR 671 (HC) it was held that –
“the onus was on the purchaser who invoked the *actio redhibitoria* to prove that the merx was latently defective at the time of the sale. The purchaser also had to show that the defect was such that it rendered the merx unfit for the purpose for which it had been sold.”
24. Similar sentiments were expressed in **DE VRIS v WHOLESALE CARS EN' N ARDER** 1986 (2) SA (O) where the court held that the *actio redhibitoria* is available to the buyer only if the latent defects is material. The test of materiality is objective – would the reasonable person in the buyer’s position have bought the goods had he known of the defects.

25. In casu evidence was led by the plaintiff that he bought the car from the defendant not as second hand but as new. Yet within two months it was virtually falling apart and that what broke the camels back was when its wheels stopped turning and the engine ceased.
26. The plaintiff's evidence of his tragedy was not seriously disputed and as I earlier noted, I find that he was a credible witness and that when he bought the car in question it was latently defective.
27. The vehicle was certainly not fit for the purpose for which it was bought. This being the case the plaintiff was entitled to cancel the agreement as he did and to claim the return or repayment of the purchase price of P129 950.00 and all the associated costs.
28. With regard to the defendant's claim of agency the evidence of its sales manager one Surti Mohammed was to the effect that they were acting as agents for Chana Motors (Botswana) (Pty) Ltd. Also submitted in evidence was an Exclusive Appointment of Subagent agreement in written form between Chana Motors (Botswana) (Pty) Ltd and the defendant.
29. It is also in evidence that the plaintiff was advised that he should approach Chana Motors for all the vehicle repair and warranty

services and that when it gave him trouble the plaintiff accordingly took the vehicle to the said Chana Motors for attention. I am therefore satisfied that at least for warranty purposes the defendant was an agent of Chana Motors (Botswana) (Pty) Ltd.

30. Having made this finding, it goes without saying that the defendant as an agent is entitled to indemnification from its principal i.e Chana Motors (Botswana) (Pty) Ltd.

31. In the premise, I hereby order as follows:-

ORDER

(a) The plaintiff is granted judgments as prayed with costs.

DELIVERED IN OPEN COURT AT GABORONE THIS 13TH DAY OF NOVEMBER 2013.


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T.T. RANNOWANE
(JUDGE)

YS Moncho Attorneys representing the plaintiff
Moses Kadye Attorneys representing the defendant