NOT REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL DIVISION, PIETERMARITZBURG

CASE NO: AR664/2016

In the matter between:

THOR SHIPPING AND TRANSPORT SA (PTY) LIMITED **FIRST APPELLANT**

MARC KAISER **SECOND APPELLANT**

and

SUNSET BEACH TRADING 208 CC t/a AUTO COMPLETE **RESPONDENT**

JUDGMENT

Delivered on : Friday, 03 November 2017

OLSEN J (MASIPA J, concurring)

[1] The two appellants in this matter, Thor Shipping and Transport SA (Pty) Limited (first appellant) and Marc Kaiser (second appellant) were sued in the alternative in the court *a quo* by the respondent, Sunset Beach Trading 208 CC. The first appellant was first defendant and the second appellant was second defendant. I will refer to the parties as they were in the court *a quo*. The defendants not only denied liability for the plaintiff's claims, but made counterclaims. The trial magistrate found for the plaintiff on the claims in convention and dismissed the counterclaims. The defendants appeal against both orders.

[2] The disputes between the parties arose out of a contract concluded for the repair of a Mitsubishi Triton vehicle by the plaintiff, a motor garage. The vehicle belonged to the second defendant. But it was known to the plaintiff, with whom the first and second defendants had previous dealings, that the first defendant, a company of which the second defendant was a director, ordinarily paid for the repairs and servicing of the second defendant's vehicle. An understanding of what the case is about, and what the learned magistrate in the court *a quo* had to decide, requires an account of the facts.

[3] On 3 June 2014 the second defendant drove into the plaintiff's garage and reported that he had noticed that his vehicle was overheating. He had warned the plaintiff's service advisor, Mr De Beer, of his impending arrival with that problem. The plaintiff (through Mr De Beer and a mechanic who subsequently worked on the car, Mr Benton) suspected a blown head gasket. It was apparent, if not on 3 June, then during the days which followed, that the second defendant was anxious that the vehicle should be repaired as soon as possible. The cause of the overheating and the consequences needed to be established. Mr Benton removed the cylinder head, and found that the head gasket (which operates as the seal between the engine block and the cylinder head) had blown. The second defendant wanted a quotation for the repairs. It ultimately was revealed to be common cause that the cost of repairs would depend upon the extent of any damage which might have occurred, principally to the cylinder head, as a result of the overheating; and that a specialist engineering firm would have to examine the head and associated parts in order to establish what had to be done to put it right.

[4] The plaintiff sent the cylinder head to an engineering company known as Miclin Engineering which was requested to undertake the assessment of the condition of the cylinder head and make a report. The plaintiff asserted and the second defendant denied that this was done with the second defendant's knowledge and consent. Miclin Engineering has a fair amount of work, and the production of its report would, according to the plaintiff's experience, take a week to ten days.

[5] It appears fair to say that things were moving too slowly for the second defendant. He asked the plaintiff (through Mr De Beer) to investigate the cost of a brand new engine for the vehicle, of a second hand engine if one was available, and of repairing the existing engine. The difficulty with regard to the last mentioned request was that the report from Miclin Engineering was still awaited. In the circumstances the plaintiff prepared a quotation for the repair of the existing engine on a so-called "worst case scenario", supposing that the report from Miclin Engineering would reveal a worst case scenario. The quote was R54 000. The central issue in this case is whether, as the plaintiff asserts, the second defendant was informed that the quotation for repairs to the existing engine was a "worst case scenario", which could change depending on the report ultimately received from Miclin Engineering; or whether, as the second defendant asserted, it was misrepresented to him that repairing the existing engine would definitely cost R54 000; that is to say that the quotation was an informed and immutable one.

[6] At the same time the plaintiff obtained a price for a brand new engine. It was so high as to exclude it from consideration. Apparently quite fortunately, the plaintiff found that a second hand engine was indeed available in the market. The existing engine had done 200 000km. The available second hand engine had only done 13 000km before the vehicle in which it was installed had overturned, and was written off. If the defendants wished to go with the second hand engine, it could be installed and the vehicle fully repaired for an estimated quotation of some R75 000.

[7] It is common cause that the second defendant instructed the plaintiff to acquire the second hand engine and install it in the vehicle. The plaintiff sues on the contract for the performance of that work. A R40 000 deposit was required for the acquisition of the second hand engine and it was paid. The work was done for an ultimate contract price of some R77 000.

[8] Whilst the plaintiff's work was underway, and shortly after the contract to install the second hand engine was concluded, the second defendant apparently coincidently met up with a Mr S Clark. Mr Clark is a trained

mechanic and has wide experience. For about 15 years he has been involved inter alia in technical investigations into engine failures. The second defendant gave Mr Clark an account of his problems with his motor vehicle, and Mr Clark suggested that the price which had been quoted by the plaintiff to repair the original engine appeared a bit high. He asked the second defendant whether he would like him (Mr Clark) to have a look at the failed engine and furnish an opinion, and the second defendant answered in the affirmative.

[9] Without any objection from the plaintiff Mr Clark then visited the plaintiff's premises more than once. He took possession of the original cylinder head and submitted it to an engineering company for an assessment of its condition in the light of the overheating episode. (When the second defendant had given the plaintiff instructions to acquire and install the second hand engine the plaintiff had retrieved the as yet unexamined cylinder head from Miclin Engineering.) There is no need to furnish an account of all the comings and goings of Mr Clark at the plaintiff's premises.

[10] Mr Clark advised the second defendant that the whole job of repairing the original engine could have been done for some R26 000. (There is some conflict in the evidence about that figure which does not matter. The important thing is that it was somewhere around one-half of the quotation furnished earlier by the plaintiff.) The cylinder head and its associated parts had not been too badly damaged.

[11] When the plaintiff advised the second defendant that his vehicle was ready for collection the second defendant refused to pay the account, claiming that he repudiated the contract because it was induced by the plaintiff having misrepresented to the second defendant that the reasonable cost of repairing the original engine was the elevated price mentioned above. Faced with that the plaintiff refused to release the motor vehicle to the second defendant, exercising a lien. A high court application eventuated. It was settled upon the basis that, under protest, the defendants (presumably, in fact, the first defendant) would pay the plaintiff an amount of some R16 000 which, together with the R40 000 deposit, would cover the plaintiff's out-of-pocket expenses.

The defendants would also provide a guarantee for the balance of the price charged by the plaintiff for the installation of the second hand engine. That was done, the vehicle was restored to the possession of the second defendant and this litigation commenced.

[12] Having got back his vehicle, the second defendant arranged for the second hand engine to be removed and for the original engine to be repaired and installed.

[13] The plaintiff sued both defendants, professing to be uncertain as to which of them was liable under the contract admittedly concluded with the plaintiff for the installation of the second hand engine. Before us it was common cause that the contracting party was the first defendant. The parties (and for that matter the learned magistrate) seemed to think that this carried some implications, perhaps as to costs. However, as was accepted by counsel during argument, the presence of two defendants made no measurable difference to the costs of the proceedings. What is more, the criticism of the plaintiff for having sued the defendants (in the alternative) rings hollow given that the counterclaim was expressed to be one made jointly by the defendants. A non-charitable reading of the magistrate's order made in favour of the plaintiff on the claim in convention suggests that the magistrate gave judgment against both defendants. I do not read the order that way, but the confusion is easily cleared up.

[14] Against this background the plaintiff sued for

(a) payment of the sum of some R20 000, being the unpaid portion of the contract price;

(b) delivery of the original engine which the defendants had uplifted from the supplier of the second hand engine, it having been a term of the contract between the plaintiff and the supplier that the original engine would become the property of the supplier; alternatively for payment of some R9 500 in substitution for the engine; and

(c) R49 200 being storage costs allegedly due to the plaintiff for the period during which it withheld delivery of the vehicle exercising its lien.

[15] The defendants counterclaimed for

(a) damages in the form of the costs of hire of a replacement vehicle for the second defendant in the sum of some R23 700;

(b) R7 500 being the alleged cost of replacing a fuel injector on the original engine which had been damaged whilst the engine was under the plaintiff's control;

(c) some R36 000 being the cost of replacing the original engine's turbo charger which appeared to have gone missing, each party blaming the other for that;

(d) some R11 500 being insurance premiums paid in respect of the vehicle whilst possession of it was withheld from the second defendant;

(e) some R42 500 being instalments paid under the finance contract relating to the vehicle whilst possession of it was withheld from the second defendant; and

(f) R450 being the cost of re-gassing the vehicle's air-conditioner which appeared to have lost its gas whilst the vehicle was being stored by the plaintiff.

[16] For reasons which do not need to be explained, because counsel were in agreement on this during the course of argument in the appeal, none of the defendants' counterclaims can be sustained unless we find that the defendants have discharged the onus admittedly on them to prove that the first defendant was entitled to avoid the contract because of the plaintiff's alleged misrepresentation concerning the high cost of repairing the original engine, which allegedly induced the contract.

[17] The question as to whether there was misrepresentation in this case is one of fact. The magistrate accepted the plaintiff's version on this fundamental issue and rejected the defendants' claim that there had been misrepresentation. An appeal court's powers with regard to findings of fact made by a trial court are limited. The appeal court will be slow to interfere with those findings. An appellant must convince the appeal court on adequate grounds that the trial court was wrong in

making a challenged factual finding. The trial court enjoys the advantage of seeing, hearing and appraising the witnesses. In the result it is only in exceptional cases that the appeal court will interfere with factual findings made by the trial court. (See *R v Dhlumayo and Another* 1948 (2) SA 677 (A); *Taljaard v Sentrale Raad Vir Koöperatiewe Assuransie Bpk* 1974 (2) SA 450 (A); and *S v Francis* 1991 (1) SACR 198 (A). The test in civil and criminal cases is the same.)

[18] In evaluating the evidence the magistrate said of the three witnesses who testified for the plaintiff (Mr Nossiter, the principal member of the plaintiff; Mr De Beer, the service advisor; and Mr Benton, the mechanic who worked on the vehicle) that their evidence was concise and to the point. Ultimately he believed them. To the extent that a reading of a record can serve to support or contradict such a credibility finding, in this case it supports the magistrate's clear impression that the plaintiff's witnesses were credible.

[19] The magistrate was not similarly impressed with the evidence of the second defendant and Mr Clark, who testified for the defendants. The magistrate identified at least eight features of the evidence tendered by these witnesses which ought to have been, but were not put to the plaintiff's witnesses. Each of these features was raised in argument before us, and counsel for the defendants accepted that the magistrate was correct to raise the issue in each instance. Reading the record there is reason to be concerned that in some respects the defendants' account of events developed during the trial.

[20] The principal argument for the defendants is that it is improbable that the second defendant would have made a decision to go with the second hand engine at some R75 000 when the cylinder head of the original engine had not yet been assessed; and when, as contended by the plaintiff, the second defendant knew that the question as to whether the repairs to the original engine could be done at a lower cost had not

yet been answered. The magistrate thought otherwise, pointing to the fact that an engine with 13 000km of use on it is a more attractive proposition than the one which had 200 000km under its belt. Furthermore, it was common cause that the second defendant was in a hurry to have his vehicle returned, having explained to the plaintiff that he had arranged a hunting trip for which the vehicle was needed.

[21] It is indisputable that subsequently the second defendant regretted the decision he made to go with the second hand engine. Upon the assumption that his subsequent election to repair the original engine was in fact the best option, the observation may be made that the second defendant is not the first person to make a rash and ill-advised decision in the heat of the moment. The magistrate found that, having realised what he regarded as his mistake, the second defendant fabricated his version. That may be correct. But I do not think that it is necessary to go quite so far. It is a common human failing almost unintentionally to modify recollections and to disregard inconvenient features of a course of events, in order to place the blame for one's own mistake elsewhere.

[22] I conclude that the magistrate's decision that the defendants did not prove the misrepresentation upon which they relied cannot be faulted. There is accordingly no need to consider the defendants' counterclaims any further.

[23] However the magistrate was not correct in allowing all of the plaintiff's claims. The claim for payment of the balance of the contract price is obviously good. That is not disputed.

[24] The defendants challenge the claim for delivery of the original engine or payment of the sum of R9 500 in substitution for it. As already mentioned, in terms of the agreement under which the plaintiff acquired the second hand engine from the plaintiff's supplier, the original engine was to be traded in. In a sense the claim for return of the engine was

one made by the plaintiff as “unappointed” agent for the supplier. However the unchallenged evidence tendered by the defendants established that Mr Clark negotiated with the supplier and reached an agreement which allowed them to take possession of the original engine for a price of R5 000, which was paid. No evidence was tendered at the trial to suggest that the arrangement was improper or that any subsequent demand had been made of the plaintiff that it should either return the engine to the supplier or pay compensation. Accordingly the claim ought not to have been allowed.

[25] Counsel for the plaintiff advisedly did not press with much vigour his argument for payment of the sum of some R49 000 on account of storage charges. The main claim for this amount was made in contract, and in the alternative an enrichment claim was pleaded.

[26] The plaintiff pleaded that the agreement upon which it relied was concluded orally. It was said to have been a term of the agreement that delivery of the vehicle would be taken (against payment, of course) upon completion of the work. It was alleged that the defendants breached the agreement by failing to collect the vehicle, thereby compelling the plaintiff to store it at a cost of R200 per day.

[27] No evidence was led to support the proposition that the defendants had undertaken orally to pay storage charges if for whatever reason the vehicle was not collected on time. The plaintiff’s standard form job card contains fine print which would place such an obligation on a customer, but it was not signed by the second defendant; and neither were the defendants called upon to answer the proposition that the contract was partly written. The magistrate allowed the claim on the basis that there were signs on the premises recording that if vehicles were not collected, storage charges would be raised. This was put to the second defendant in cross-examination. His answer was that he believed that there were some signs but he had not registered whatever was on them. A claim that consensus had been reached on

the issue because of the signs, or that the claim could be sustained on the basis of quasi-mutual assent, were not pleaded. (As to what might have been pleaded, see *Durban's Water Wonderland (Pty) Ltd v Botha and Another* 1999 (1) SA 982 (SCA) at 991-2.)

[28] As to the enrichment claim, counsel for the plaintiff made no submissions in support of it. Assuming it to be arguable that some level of enrichment (and matching impoverishment) arose because the second defendant had his vehicle kept safe without charge for the storage period, the answer to the claim would probably lie in the proposition that a lien-holder keeps possession for its own benefit, as a result of which it is not entitled to claim compensation by way of storage charges. (See in this regard the full court decision in *Wessels v Morice* (1913) 34 NPD 112; and *Laingsburg School Board v Logan* (1910) 27 SC 240.)

[29] The defendants are accordingly substantially successful in this appeal. The judgment for two of the three claims made by the plaintiff must be set aside. Counsel were in agreement that if the judgment on the merits of the appeal should turn out as it has, it serves the interests of both parties that they should each pay their own costs in the appeal, but that they should share the costs of the record. Given that the appeal against the dismissal of the counterclaim fails, and that much of the evidence in the case went equally to both the claim and the counterclaim, that seems a sensible approach.

The following order is made.

1. The appeal against the judgment in favour of the plaintiff on the claim-in-convention is upheld in part.

2. The magistrate's order on the claim-in-convention is set aside and the following order is substituted for it.

> **"Judgment is granted in favour of the plaintiff against the first defendant for**
>
> **(a) payment of the sum of R20 763.81, together with interest thereon at the prescribed rate of interest from 19 June 2014 to date of payment;**
>
> **(b) costs of suit."**

3. The appeal against the dismissal of the claim-in-reconvention with costs is dismissed.

4. Each party shall bear one half of all the costs of obtaining, preparing and presenting the requisite copies of the appeal record. Save for that each party shall pay its own costs in the appeal.

OLSEN J

MASIPA J

Date of Hearing:	Heard at Durban on FRIDAY, 20 OCTOBER 2017
Date of Judgment: :	FRIDAY, 03 NOVEMBER 2017
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For the Respondent:	MR R M HAND
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