IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

NOT REPORTABLE

Case no: 487/2005

In the matter between

CARTORIA MOTOR INDUSTRIES (PTY) LTD **APPELLANT**

and

J J SWANEPOEL **RESPONDENT**

Coram: **STREICHER, BRAND and HEHER JJA**

Heard: **8 MAY 2006**

Delivered: **19 MAY 2006**

Summary: Practice – absolution from the instance at the close of the plaintiff's case – test applied – fraudulent misrepresentation – *prima facie* proof of.

Neutral citation: This judgment may be referred to as Cartoria Motor Industries v Swanepoel [2006] SCA 58 (RSA).

JUDGMENT

HEHER JA

HEHER JA:

[1] This is an appeal (with leave of this Court) against an order of the Transvaal Provincial Division (Seriti J, Daniels J concurring) dismissing an appeal against an order of absolution from the instance at the close of the plaintiff's case in the magistrate's court at Pretoria.

[2] The plaintiff (appellant) is a dealer in new and used motor vehicles. The defendant (respondent) purchased a 1995 Mitsubishi 2.8 Pajero vehicle from the plaintiff's Sinoville branch during August 2000 for a price of R122 798,25. On 18 December 2000 he resold the same vehicle to the plaintiff's Vermeulen Street branch for R120 000,00. The plaintiff sued the defendant in the court of first instance in April 2001 on several alternative causes of action for payment of R20 000,00 and costs. Fundamentally, the plaintiff's complaint was that the vehicle that the defendant had sold to it as a 2.8 Pajero was in fact a 2.5 model. The plaintiff relied on an express term of the written contract which allowed it to readjust 'the price offered' in the event of the sale documents including incorrect information, alternatively it claimed damages for breach of an express or implied term, further alternatively damages for breach of a warranty, then damages arising from a fraudulent misrepresentation, and finally loss of profits (of R15 000,00) arising from the contemplated resale of a 2.8 model Pajero which the defendant's breach of contract had prevented.

[3] The written contractual terms of the sale were common cause on the pleadings. The defendant denied or placed in issue almost all else. He also raised a defence of estoppel arising out of an alleged representation made to him at the time of the purchase of the vehicle from the Sinoville branch.

[4] The plaintiff was unable to present direct evidence of the circumstances of the sale because its salesman had died before the trial. Mr Nel gave evidence that he

valued the vehicle offered to the plaintiff by the defendant at R120 000,00 before the plaintiff accepted the offer. The defendant signed the vehicle appraisal (which also contained the provision for adjustment of the offered price referred to earlier). After the vehicle was found to be a 2.5 model Nel revalued the vehicle at R100 000,00. The plaintiff called Mr Roos who had inspected the vehicle after the sale and ascertained that it was indeed a 2.5 model. Mrs Viljoen testified that the vehicle was sold by the plaintiff to Monsan Trading on 23 April 2001 for R127 192,98 after repairs costing about R6500,00 had been made to it by the plaintiff. Mr Vos of the Sinoville branch testified to the circumstances under which the defendant had complained to him that the vehicle that he originally purchased in August 2000 was a 2.5 model and not a 2.8. I shall refer more fully to the evidence in the course of discussing the issues in the appeal.

[5] At the close of the plaintiff's case the magistrate granted the defendant's application for absolution from the instance. He found in the plaintiff's favour that the vehicle was a 2.5 and not a 2.8 model Pajero. However, in giving judgment for the defendant on the application as a whole, he tested the plaintiff's evidence against proof on a balance of probabilities. In doing so he misdirected himself as the courts have many times explained that the test at the stage of the close of the plaintiff's case is a much lighter one. Most recently in *Gordon Lloyd Page and Associates v Rivera and another* 2001 (1) SA 88 (SCA) at 92E-93A Harms JA said

'The test for absolution to be applied by a trial court at the end of a plaintiff's case was formulated in *Claude Neon Lights (SA) Ltd v Daniel* 1976 (4) SA 403 (A) at 409G-H in these terms:

". . . (W)hen absolution from the instance is sought at the close of plaintiff's case, the test to be applied is not whether the evidence led by plaintiff establishes what would finally be required to be established, but whether there is evidence upon which a Court applying its mind reasonably to such evidence, could or might (not should, nor ought to) find for the plaintiff. (*Gascoyne v Paul and Hunter* 1917 TPD 170 at 173; *Ruto Flour Mills (Pty) Ltd v Adelson (2)* 1958 (4) SA 307 (T).)"

This implies that a plaintiff has to make out a *prima facie* case – in the sense that there is evidence relating to all the elements of the claim – to survive absolution because without such evidence no court could find for the plaintiff (*Marine & Trade Insurance Co Ltd v Van der Schyff* 1972 (1) SA 26 (A) at 37G-38A; Schmidt *Bewysreg* 4th ed at 91 – 2). As far as inferences from the evidence are concerned, the inference relied upon by the plaintiff must be a reasonable one, not the only reasonable one (*Schmidt* at 93). The test has from time to time been formulated in different terms, especially it has been said that the court must consider whether there is "evidence upon which a reasonable man might find for the plaintiff" (*Gascoyne (loc cit*)) – a test which had its origin in jury trials when the "reasonable man" was a reasonable member of the jury (*Ruto Flour Mills*). Such a formulation tends to cloud the issue. The court ought not to be concerned with what someone else might think; it should rather be concerned with its own judgment and not that of another "reasonable" person or court. Having said this, absolution at the end of a plaintiff's case, in the ordinary course of events, will nevertheless be granted sparingly but when the occasion arises, a court should order it in the interests of justice.'

[6] On appeal, the Transvaal Court considered only whether the plaintiff had proved the quantum of its claim. It concluded that the plaintiff had 'failed to adduce any evidence of proof of damages based on breach of contract' and 'failed to adduce any evidence which indicates that had the respondent not committed a delict he would have been in a better financial position. There is no evidence about the market value of the motor vehicle in question. The probabilities are that the respondent would have negotiated on the basis of the market value of the motor vehicle and not on the trade-in value.'

[7] For the purposes of determining the present appeal it will be sufficient to analyse the evidence presented by the plaintiff in support of the case based on fraudulent misrepresentation. In this regard it was common cause in the appeal that the vehicle sold to the plaintiff was *prima facie* proved to be a 2.5 model Pajero. There was also no dispute that the Purchase Agreement which the parties signed contained the following opening words

'I hereafter referred to as the Seller, agree to sell the following article to Cartoria Toyota hereafter [referred] to as the Buyer, and declare and swear that the following particulars are true and correct.'

One of such particulars was the vehicle description, *viz* '95 Mitsubishi Pajero 2800 TDI'. So there was the misrepresentation.

[8] There was no dispute at the trial that the plaintiff had valued the vehicle according to the description in the vehicle appraisal form and had fixed the price which it offered for the vehicle on the basis of that valuation, as the defendant must have known it would. That constituted the reliance on the misrepresentation.

[9] As to the defendant's knowledge of the falsity of the representation Vos testified that the defendant had apparently expressed unhappiness to the salesman who negotiated the Sinoville sale because he felt he had been sold a 2.5 and not the 2.8 model represented to him. Vos sent the vehicle to the Mitsubishi dealer who confirmed that it was a 2.5 model. He informed the defendant and furnished him with various explanations for the mistake. He testified, 'Op 'n latere stadium het ek en hy self kontak gemaak en ek het gedink ons het die ding uitsorteer, alhoewel ons altwee toe onder – ons het altwee toe bewus geword van die feit dat dit 'n 2.5 is en dit daar gelaat.'

There was, therefore, *prima facie* proof before the trial court that the defendant knew, at the time he made the misrepresentation to the plaintiff in concluding the second sale, that the description of the vehicle was false.

[10] Proof of the quantum of damages depended largely on the evidence of Nel. His expertise was *prima facie* established. He told the magistrate that, in accordance with his experience and everyday practice as chief valuer of the branch, he had valued the vehicle (on initial assessment as a 2.5 model and, after ascertaining the true state of affairs, as a 2.8) on the basis of its market value, ie what the plaintiff would be

prepared to pay for such a vehicle in the market. He identified the factors that, as a matter of course, he took into account in arriving at such a valuation: the market for that specific type of vehicle, its availability, stocks on hand, the date of first registration, the general condition of the vehicle and its engine capacity (lesser capacity means lesser power and translates into lower price). He confirmed the statement in his expert summary to the effect that used car dealers did not purchase such vehicles for more than their trade-in value but qualified this by testifying that there is no trade-in value on imported vehicles (such as the 2.5 model Pajero) and that he had, therefore, fixed market-related prices in this instance.

[11] The court *a quo* (and, perhaps, the magistrate also) understood Nel's evidence to mean that the plaintiff purchased vehicles at a value (the trade-in value) which was necessarily different from market value and, for that reason, the difference between the two values fixed by Nel was unacceptable as a measure of the plaintiff's damages.

[12] It seems to me that if Nel had used the same standard on each occasion the measure of the loss would have been *prima facie* established irrespective of whether he applied trade-in value or market value. (Strictly-speaking a trade-in was not in question in the present case as there was no exchange of vehicles involved.) But, as I interpret his evidence, Nel told the magistrate that when a potential seller brings a vehicle to the plaintiff the value which the plaintiff will place on that vehicle is no more or less than the plaintiff would be prepared to pay for it in the market, ie the market created by sellers of and dealers in used cars. That was the market in which the defendant offered and sold the vehicle in question. Both parties were willing participants and, for the purpose of determining the market values of 1995 2.5 and 2.8 models the evidence provided acceptable prima evidence of the respective values. The plaintiff paid a market value of R120 000,00 for what was represented as a 2.8 model; it received a 2.5 model worth R100 000,00 in the market. Taking the plaintiff's case at

face value, one has no reason to doubt that when the plaintiff took delivery of the vehicle it was R20 000 worse off than it would have been if the delict had not been committed. That was sufficient to establish its damages, *De Jager v Grunder* 1964 (1) SA 446 (A) at 457D; *Erasmus v Davis* 1969 (2) SA 1 (A) at 9, in the absence of countervailing evidence from the defendant. That the plaintiff afterwards sold the vehicle (as a 2.5 model) to Monsan Trading at a profit had no effect on the fact of that loss and is irrelevant as it would have had the R20 000 in its hands had no delict been committed, irrespective of the subsequent fate of the vehicle.

[13] For the aforegoing reasons the magistrate and the court *a quo* should have found that the defendant had a case to answer at least in respect of the claim based on fraudulent misrepresentation. It is unnecessary in deciding this appeal to express an opinion about the other claims.

[14] In the result therefore the appeal must succeed. The following order is made:

1. The order of the court *a quo* is set aside and replaced with the following:
   'The appeal succeeds with costs. The order of the magistrate granting absolution from the instance is substituted by an order refusing the application with costs. The case is remitted to the magistrate for the continuation of the trial.'
2. The respondent is to pay the costs of the appeal.

J A HEHER
JUDGE OF APPEAL

STREICHER JA)Concur
BRAND JA)