IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE, GRAHAMSTOWN)

Case no: 3878/2013
Date heard: 15 – 16 April 2015
12 June 2015
Date delivered: 19 June 2015

In the matter between

GEORGIOS VOUSVOUKIS **Plaintiff**

vs

QUEEN ACE CC t/a ACE MOTORS **Defendant**

JUDGMENT

PICKERING J:

[1] Plaintiff is Georgios Vousvoukis, an adult male businessman of Queenstown. Defendant is Queen Ace CC t/a Ace Motors a duly registered close corporation with its principal place of business at Queenstown. Defendant carries on business as, *inter alia*, a dealer in used motor vehicles.

[2] It is common cause that on 13 September 2011 plaintiff purchased from defendant, who was represented by Mr. J. Pieterse ("*Pieterse")* a used 2006 model BMW M5 motor vehicle ("*the BMW*") for the sum of R470 000,00. Of this purchase price plaintiff paid the sum of R170 000,00 in cash. The remainder of the purchase price was paid to defendant by Wesbank arising of a large instalment credit agreement between plaintiff and Wesbank. Plaintiff's total indebtedness in terms of this agreement was R304 290,00, his monthly instalments being R6866,80 until 1 October 2016.

[3] It is common cause that the BMW is a high performance motor vehicle which requires high performance fully synthetic oil.

[4] Plaintiff took delivery of the BMW on 13 September 2011 at which time its odometer reading was 79870 kilometres.

[5] It is common cause that on or about 27 December 2011, with an odometer reading of 84206km, the BMW experienced certain mechanical problems. The following day the BMW was taken by Pieterse to Autohaus Monti, a BMW dealer in East London, where it was discovered that the engine had been destroyed through no fault of the plaintiff.

[6] It is further common cause that at its own cost defendant replaced the destroyed engine with a second engine at a cost of R70 000,00 and that the BMW was returned to plaintiff on or about 27 February 2012. Thereafter, during July 2012, with an odometer reading of 92265km the second engine also experienced mechanical problems.

[7] Plaintiff alleged in his particulars of claim that these problems also resulted in the destruction of the engine and averred that on 27 July 2012 he tendered the return of the vehicle to defendant but that defendant rejected such tender. He therefore claims *inter alia*, refund of the purchase price. In the alternative, plaintiff relies on the provisions of the Consumer Protection Act 68 of 2008 ("*the Act*") in that the supply of the BMW to him contravened the implied warranty of quality contained in section 55(2)(b) and (c) thereof. On this basis he claims restitution in terms of s56 (2) of the Act. In the further alternative, plaintiff alleges that the second engine installed by defendant was, unbeknown to plaintiff, latently defective at the time of its installation in the BMW and claims restitution flowing from the *actio redhibitoria*.

[8] In its initial plea defendant merely pleaded that after examining the BMW it disclaimed responsibility to plaintiff in respect of the damage. In an amended plea, however, defendant denied that the engine was destroyed and pleaded that the drive of the oil pump was damaged "*in consequence of a cause unknown but likely because of some or other object having fallen into the engine when the oil was replenished by plaintiff and further that the oil pump having been repaired, the engine has been restored to full working order.*"

[9] It was also common cause by the time of the trial that the second engine had not in fact been destroyed; that the cause of the BMW's mechanical problems was in fact damage to the oil pump's drive gear resulting in certain of the teeth of the oil pump drive gear shearing off; and that with the repair of the oil pump the engine had been restored to full working order.

[10] What had caused the damage to the teeth was, however, the subject of much debate at the trial.

[11] Before turning to deal with the expert evidence which was led by both parties as to the cause of the damage to the oil pump it will be convenient to deal with the background evidence of plaintiff and of Pieterse who testified on behalf of the defendant.

[12] In his evidence plaintiff confirmed that he had purchased the BMW on 13 September 2011 at the aforementioned price.

[13] With regard to the first engine plaintiff stated that on Sunday, 27 December 2011, he was on his way back to Queenstown from a trip to East London. As he was entering Queenstown the BMW lost power and went into so-called "*safety*" mode. He drove straight home and parked the vehicle. The following day he contacted Pieterse who fetched the BMW and sent it down to Autohaus Monti in East London who were the authorised BMW dealers.

[14] He was thereafter informed that the engine had given in, there apparently being a "*bearing knock*", and it had to be replaced. He was given the option of either obtaining an entirely new engine, apparently at his expense, or installing a second hand engine. The cost of the new engine was prohibitive and he accordingly opted for the second hand engine. He stated that the suggestion was made by Pieterse that he pay for the second hand engine but he refused to do so.

[15] It is common cause that a second hand engine was duly sourced from a vehicle in Gauteng which had been involved in a rear end collision at a time when its odometer reading was 20 000km and that it was installed in the BMW.

[16] The BMW was returned to plaintiff at the end of February 2012, after the installation of the second engine. Plaintiff then used it in Queenstown and on business trips to East London, until, during July 2012, it again experienced mechanical problems evidenced by a knocking noise coming from the engine. He drove the vehicle slowly back to his house and left it in his garage. He contacted Pieterse and told him of the problems and said that he did not want the car. Pieterse said that he had to sort out the problems on his own. Pieterse, however, eventually arranged for the vehicle to be taken to Autohaus Monti. Plaintiff was thereafter advised that there was bearing damage, the engine had seized and that a new engine would again be required. Plaintiff reiterated to Pieterse that in the light of all the problems he did not want the BMW anymore.

[17] The BMW's odometer reading at that time was 92265km. Since the replacement of the engine he had travelled 8059km in the vehicle. He stated that during that period the BMW had not been serviced. He stated further that the oil warning light had never come on and that it had not been necessary to top up the oil.

[18] As appears from the plea it was the defendant's case that the damage was occasioned to the oil pump by some or other object having been dropped into the engine through the oil filler cap when the plaintiff replenished the oil. In the light of this it was put to plaintiff by Mr. de la Harpe, who appeared for the defendant, that it was impossible that the engine would not have required an oil top up within the travelled distance of 8 000km, inasmuch as the defendant's evidence would be that the engine consumed 1 ½ litres of oil per 1000km. It was further put that, if the oil had not been topped up, the engine would have run dry, whereas, when the engine was inspected by the workshop manager of Autohaus Monti, Mr. Gravett, it was found that the

bearings were in perfect order and that the engine was not starved of oil. Despite this, plaintiff persisted in his denial that he had topped up the oil at any stage.

[19] Plaintiff stated that eventually during or about June 2013 he went to Autohaus Monti with his attorney and spoke to Gravett. Gravett informed him that the engine had "*gone*" and needed to be replaced. He was also told that he should bring the motor vehicle back to Queenstown because it was parked outside at Autohaus Monti and the seats were being damaged by the heat of the sun. He accordingly did so. Thereafter, during 2013, summons was issued against defendant.

[20] It was put to plaintiff by Mr. de la Harpe that, as alleged in defendant's plea, the oil pump had been damaged but that it had been repaired and that the engine was now in perfect working order. Plaintiff stated that even had he known this prior to the issue of summons he would not have taken the BMW back because, as he said, "*what is to say that there was something else wrong.*" He had lost faith in it.

[21] Mr. Pieterse testified that he was a member of the defendant. He confirmed that on 13 September 2011 he had sold the BMW to plaintiff. He stated that approximately a week later, on a Sunday, plaintiff had telephoned him from Cathcart and told him that the vehicle's red oil light had come on. Pieterse advised plaintiff to top up the oil. On the following day Pieterse collected the vehicle from plaintiff. Because he was not certain that the oil put in at Cathcart had been fully synthetic he drained the oil and returned the vehicle to plaintiff. At some stage thereafter the BMW's onboard computer advised plaintiff that the brake pads needed to be replaced. Pieterse took the BMW to Autohaus Monti where the brake pads were replaced at his own cost.

[22] Thereafter, during December, Pieterse was again contacted by plaintiff on a Sunday. Plaintiff complained of a "*funny*" noise in the engine. Pieterse again collected the BMW from plaintiff. He confirmed that it had a "*funny*

noise in the engine" and was in so-called "*limp mode*". He took it to Autohaus Monti where it was examined by Gravett.

[23] In due course Pieterse was informed by Gravett that the vehicle had "*run a bearing*" and had been destroyed. Because of the exorbitant cost of a new engine it was agreed between Pieterse and plaintiff that a second hand engine be fitted. This engine cost R70 000,00. Pieterse paid for the engine himself. The second engine was duly delivered to Autohaus Monti and fitted to plaintiff's BMW. At that time Gravett suggested to Pieterse that new radiators, fans and solenoids be fitted as well, resulting in a total cost of R120 000,00.

[24] According to Pieterse he then spoke telephonically to plaintiff and asked him whether he could contribute the sum of R50 000,00 towards the repair of the vehicle because the radiators, fans and solenoids were not really necessary but were being replaced as a precautionary measure. Plaintiff replied to this that he just wanted his car fixed and agreed to pay the sum of R50 000,00. Pressed on this alleged agreement under cross-examination by Mr. Paterson, who appeared for plaintiff, Pieterse stated that he had pointed out to plaintiff that he was to receive the benefit of the new radiator, fans and solenoids and accordingly asked him for help. To this plaintiff said "*that is fine*".

[25] Pieterse then retrieved the BMW from Autohaus Monti and drove it back to Queenstown. Plaintiff came to fetch it on a Saturday. When he did so, Pieterse said to him that on the following Monday, when he brought his cheque for R50 000,00, they could complete the warranty for the engine. According to Pieterse plaintiff never came back to him on Monday and he was never paid the R50 000,00 which plaintiff had undertaken to pay.

[26] Pieterse stated that he never claimed this money from plaintiff because "*our business belongs to God. If somebody steals from us he steals from God.*"

[27] In the light of this some might think that it was not entirely co-incidental that the next event relating to the BMW also occurred on a Sunday. On that day plaintiff telephoned Pieterse and told him that the car was in "*limp*" mode and that there was a "*funny noise*" emanating from the engine. Pieterse collected the vehicle from plaintiff's house the next day. He confirmed that the car was in "*limp"* mode and that there was a "*rumbling*" noise or "*geraas*" from the engine.

[28] Later that day plaintiff came in to speak to Pieterse. Plaintiff made a joke about the R50 000,00 saying "*I suppose you are still waiting for your money*". Pieterse then told him that his initial six month warranty had expired and that he could not help him. He explained that the warranty on the second hand engine had never come into operation because of plaintiff's failure to complete the necessary forms. Plaintiff's response was to say that he did not want the vehicle anymore and he left.

[29] Pieterse stated that shortly after this exchange he was hospitalised for three weeks. In his absence the BMW was sent to Autohaus Monti by his workshop manager. Thereafter he had no dealings with the matter, until, during December 2013, summons in this case was served upon him.

[30] He confirmed that after certain negotiations between plaintiff's attorneys and defendant's attorneys the engine of the BMW was opened by Gravett and that it was then established that the problem lay with the oil pump. Pieterse instructed Gravett to fit a new oil pump. He conceded that he had never asked plaintiff for permission to do so.

[31] Each of the parties adduced the evidence of an expert witness.

[32] Mr. Zondagh, the Service Manager at Continental Motors, BMW, in Port Elizabeth for the last 25 years, testified on behalf of plaintiff. He testified that although he was not a qualified mechanic he had been dealing with car engines for most of his working life of over 40 years and that he had had

considerable experience with the repair and servicing of engines of BMW M5 motor vehicles.

[33] Mr. Rodney Gravett testified on behalf of defendant. He qualified as a motor mechanic in 2004. He was at first employed as a mechanic by Autohaus Monti, thereafter being promoted to Workshop Foreman. He is currently employed as Service Manager and also has considerable experience with the repair and servicing of BMW M5 motor vehicles.

[34] Gravett testified that at the time of installation of the second engine it was discovered that it's sump, which holds 9,5 litres of oil and covers the whole of the bottom of the engine, had been cracked on the side. He stated that the sump was made of aluminium and that the crack had been "*aluminium welded*" and thereby sealed.

[35] He stated that it was improbable that the sump had been damaged in consequence of any collision. In his view the crack could have occurred during the transport of the second engine to East London or when the engine was removed from the previous vehicle. It was, he stated, very unusual to see a crack on the side of the engine sump, any such crack normally being at the bottom thereof.

[36] He decided in the circumstances to rather take the sump off the first engine and use it on the second engine instead of the cracked sump. This was duly done. He stated that when he removed the damaged sump from the second engine he found no dislodged pieces of metal in it. He stated further that the oil offtake from the sump was fitted with a fine mesh which would have prevented any foreign object in the sump from being pumped into the oil pump.

[37] When the BMW was eventually brought to him during 2013 Gravett's first diagnosis, without having opened the engine but based on the noise thereof, was that the vehicle had engine damage internally on the main bearings on the crankshaft. He assumed that there was some connection

between the cracked sump and a possible deficiency of oil which had occasioned damage to the bearings. Once the engine had been opened he removed its sump in order to investigate. He discovered that the crankshaft bearings were in perfect working order. The engine was not starved of oil. He discovered that certain of the driving gear's teeth of the oil pump had sheared off in different places. There were metal shavings in the sump, which he described as being a bit like rough sand or iron filings. He stated that it was possible that some of these could have been debris from the destroyed teeth.

[38] He testified that Zondagh had asked him whether there was a possibility that the damage on the sump and the subsequent welding thereof had caused the actual failure. He replied that "*I told him the sump has been cracked and welded but there is no ways to prove anything or to even show any signs that it was the actual sump which caused the damage*" but "*I said nothing is impossible.*"

[39] In this regard Zondagh confirmed having spoken telephonically to Gravett. He stated that he did so after having been requested during December 2013 by plaintiff's attorneys to furnish an expert opinion in respect of the damage to the BMW. He ascertained from Gravett that by that time the engine had been opened and the problem diagnosed, namely that certain teeth of the oil pump drive gear had sheared off. He was advised that the oil pump had been repaired. In view of the fact that he would not be able to strip the engine and examine it forensically he decided that there was no point in going to East London to inspect it.

[40] He discussed the matter with Gravett who also sent him photographs of the damage to the teeth of the drive gear (Exhibit C). Gravett informed him that it had been discovered when the second engine arrived from Gauteng, prior to its installation into plaintiff's BMW, that its aluminium sump was cracked and that it had been "*aluminium welded*".

[41] Zondagh stated that he never had the opportunity to inspect the cracked sump and, at the time of compiling his expert report, assumed in the light of his conversation with Gravett that it had probably cracked due to an impact with the road or a stone which had dislodged a piece of metal which had ended up in the space where the oil drive was located. He assumed in the light of this that, when the engine was started, the piece of metal must have become dislodged and fallen into the drive gears, resulting in the damage to the oil pump drive. He stated that when he discussed the defective engine with Gravett they both agreed that the possibility existed that the drive gear might indeed have been damaged by an aluminium chip or shard from the sump ending up and becoming embedded in the engine until eventually being shaken loose. According to Zondagh that was, in his experience, a common occurrence.

[42] Under cross-examination it was put to him by Mr. de la Harpe that, according to Gravett, the crack in the sump was in all likelihood caused either during the dismantling of the engine or on its transport to East London inasmuch as the repaired crack was on the side of the sump and did not appear to Gravett to have been caused by the impact of an accident. Zondagh very fairly conceded that, if Gravett was correct, it was unlikely that a shard of aluminium had become dislodged from the sump and had found its way into the engine. He fairly agreed further that the damage to the sump could therefore be discounted as a possible cause of the damage to the oil pump.

[43] That was the extent of the agreement between the two experts.

[44] In his further evidence Gravett reiterated what had been stated in defendant's plea, namely that in his opinion some or other object must have fallen into the engine when it was being topped up with oil. In this regard he said that he had on two previous occasions experienced objects falling through the oil filler cap. He conceded, however, that on both these occasions the engine had not thereafter been started before the objects had been retrieved and that he accordingly had no experience of an object

actually finding its way down through the engine to cause damage to an oil pump. He stated that this foreign object was in all probability a piece of plastic or foil which had fallen from the cap of an oil container into the engine.

[45] This theory was rejected by Zondagh in no uncertain terms as being impossible. He stated "*these are hard gears and a piece of plastic wouldn't do that kind of damage."* Asked what qualified him to arrive at that conclusion he stated that it was based on his common sense, experience and mechanical knowledge. In his view, "*a thin little piece of plastic is not going to break those gears.*" Elucidating on this he stated "*so what I am saying, an oil cap that size is going to get crunched plenty before it gets (interrupted)*". He stated further that "*nobody really knows what caused the damage*" and that "*no one could possibly know the exact detail without really having forensically looked at this engine... I would say we are looking at a small bolt or piece of aluminium, something like that, but without forensic inspection who knows?*"

[46] In this regard Zondagh was taken to task by Mr. de la Harpe for having come up at the last moment with "*a novel theory*" to replace his initial theory that the damage had been connected somehow to the cracked sump. In my view, Mr. de la Harpe's criticism of Zondagh is unduly harsh.

[47] Zondagh impressed me as a down to earth, straight forward man and I do not believe that he was attempting to manufacture a theory in order to bolster plaintiff's case. It is clear that he was at all times under the impression, fortified by his knowledge that the BMW from which the engine had been removed in Gauteng had been involved in a collision, as well as by his telephonic conversation with Gravett, that the sump had been damaged in a collision. As I have said, he was adamant that the theory that a piece of plastic had somehow fallen into the engine through the oil filler cap and had caused the damage was impossible and, when the damage to the sump was eliminated as a cause, sought a probable alternative.

[48] When Zondagh's statement that a piece of plastic or foil could not have caused the damage was put to Gravett by Mr. Paterson he replied, tellingly,

"*actually I don't have an answer for that. Some type of material engineer would maybe just say ... You can't tell if you drop a piece of plastic what it is going to do. I can't say.*"

[49] In the event, no such "*material engineer"* was called by defendant to substantiate Gravett's theory.

[50] Mr. Paterson put it to him further that the most likely cause of damage was that posited by Mr. Zondagh, namely that some small piece of metal had come loose from somewhere in the engine. Gravett replied that that was "*possible"* and stated "*like I have said I have no clue as to what that object was that caused the damage*" and "*there is no direct evidence*." He stated that "*it cannot be determined how long the object would have been in the engine or what the object was as it was disintegrated when jamming between the gears*" but conceded that it was possible that it had been present and hidden in the engine for some time prior to it causing the damage. He conceded too that it was possible that a shard of metal or some other object had lodged itself in a nook or cranny of the engine which he could not see, more especially as he had only viewed the engine from the bottom up and had not examined the top thereof. He stated that because of the very fine tolerances and the fact that the cogs were made of high tensile steel, the smallest object could cause damage to a cog and, if the first cog broke, there would easily be a ripple effect on the other cogs causing them to shear before everything was spat out into the sump resulting in the iron filing residue at the bottom of the sump. He reiterated that he had "*no clue*" as to what that object might have been.

[51] He stated that his theory was "*the most probable*" of the two. Under re-examination, however, he expressed the view that Zondagh's theory was not possible. With respect to Gravett he appears to have adopted the evidentiary equivalent of a scorched earth policy, metaphorically burning every concession he had originally made as he retreated to the redoubt of re-examination. In my view, his final opinion that Zondagh's theory was not possible cannot be accepted. It is clear that he initially regarded it as being a

reasonable possibility. His own theory was in any event fraught with imponderables and, by his own confession, he had no idea, not being a material engineer, as to whether it was itself possible or not.

[52] Furthermore, the two examples relied upon by him of items falling through the oil filler cap take the matter no further in light of the fact that both had been retrieved before the engine had been started.

[53] In my view Zondagh is correct in his opinion that absent a proper forensic examination of the engine it is not possible to determine the exact cause of the damage. It is not possible to reject out of hand Zondagh's theory that the damage was caused by some object already inside the engine especially when it is borne in mind that, as Zondagh stated, this was a second hand engine with all the risks inherent therein.

[54] Furthermore, an essential pillar of Gravett's theory was that the BMW's oil must have been replenished during the relevant period. In my view the evidence does not support this.

[55] In Zondagh's first report he stated that an oil consumption of 3 litres per 10 000km would be considered normal for a V10 engine. In his evidence, however, he modified this statement to some extent. He stated that "*if the engine used up to 3l per 10 000km that would be considered not abnormal*" because of the fact that this is a "*very high revving engine*." He stated that nevertheless "*in BMW terms that would be considered for a fairly hard driver*" and would be a "*fair expectation for this type of car driven enthusiastically.*"

[56] He stated that what he termed as being a "*gentle driver*" would probably "*get away with maybe 1l per every 10 000kms*". He expanded upon this by stating that "*somebody who doesn't rev the hell out of this car every day would get by with 1l per 10 000kms*" which he described as being "*fairly normal*".

[57] If the vehicle was used to its maximum performance, however, the oil consumption would increase dramatically. The figure of 1,5l per 1 000km which had been put to plaintiff by Mr. de la Harpe was, according to him, "*the maximum spec which would be an indication that the engine needed an overhaul.*" He added that if plaintiff's driving style was not "*that hectic or aggressive*" the car might well not have consumed a litre of oil in 8 000km, whereas, by 10 000km, it probably would have done so. It was only after the consumption of a litre that the oil warning light would be activated.

[58] In his evidence Gravett was asked what the "*normal consumption*" of oil under driving by a "*reasonable, normal driver"* would be. His reply was that "*it is debatable*" and all depended on the driving conditions. He then stated that it was difficult to put an exact figure for driving on the open road but estimated 1 litre to 3 500/4 000 kilometres. Questioned about this he stated that "*well I haven't experienced it*. *That is the feedback I am getting from our clientele*".

[59] Asked what the oil consumption would be if the vehicle was driven quite hard and aggressively he stated that "*I have had guys coming down from Cape Town to East London which is almost a 1 000 kilometres and it has used a litre of oil and that is in the upper rev limits, driving at great speed*."

[60] Asked whether plaintiff's evidence that he had driven the BMW for 8 000 km without having had to put in oil was improbable, he stated "*look, with my customers and clients that I have dealt with, I haven't seen as much as 8 000km without consuming a pint of oil.*" He then stated that "*none of our customers that I have currently got have driven that amount of mileage without an oil top up. That's the only reason I can give"* and added "*it would have consumed some amount of oil.*"

[61] That the vehicle would have consumed some oil was not in dispute. The question to be determined was whether it would have consumed such an amount of oil, namely more than one litre, as would have activated the oil warning light, something which plaintiff denied had happened.

[62] It is immediately apparent from Gravett's evidence that he in fact has no firsthand knowledge whatsoever as to the actual oil consumption of the BMW. Whatever knowledge he has would appear to be based almost entirely on anecdotal, hearsay averments by certain unnamed clients, some of whom would appear to have had little regard to the speed limits.

[63] In all the circumstances it seems to me that Gravett's evidence, both as to the possible cause of the damage as well as the oil consumption of the BMW is largely speculative in nature.

[64] The expert evidence, however, does not stand alone.

[65] In Roux v Hattingh 2012 (6) SA 428 (SCA) Plasket AJA stated as follows at 435 G – I, para 20:

> "*In Motor Vehicle Assurance Fund v Kenny Eksteen J held, in the context of a motor collision, that* '(d)irect or credible evidence of what happened in a collision, must, to my mind, generally carry greater weight than the opinion of an expert, however, experienced he may be, seeking to reconstruct the events from his experience and scientific training'; that the view of an expert witness as to what might probably have occurred should generally 'give way to the assertions of the direct and credible evidence of an eye witness'*; and that it is* 'only where such direct evidence is so improbable that its very credibility is impugned that an expert's opinion as to what may or may not have occurred can persuade the court to his view.'"

[66] In Representative of Lloyds v Classic Sailing Adventures 2010 (5) SA 90 (SCA) at 107F – G para 60 the following was stated:

> "*I must emphasise that where there is eyewitness or direct evidence of an occurrence, this may render the reconstructions of experts less relevant or even irrelevant (this observation is particularly pertinent to the evidence of Lloyd's expert, Mr. AJ Sinclair): see Parity Insurance*

> *Co Ltd v Van den Bergh* *and* *Van Eck vs Santam Insurance Co Ltd,* *where the court said that while it was not unusual for parties to tender expert evidence to determine the cause of a collision, the expert's evidence is* 'inevitably based on reconstruction and cannot conceivably bear the same weight as direct, eye-witness testimony of the event in question.'"

[67] Of relevance too is the matter of MV Banglar Mookh: Owners of MV Banglar Mookh v Transnet Ltd 2012 (4) SA 300 (SCA) in which it was held that expert evidence reconstructing an incident was only reliable where the underlying facts on which the reconstruction was based were established.

[68] In the light of what in my view was the unsatisfactory and speculative evidence of Gravett as to the oil consumption of the BMW it cannot be said that plaintiff's evidence that he did not replenish the oil is so improbable that its very credibility is impugned. On the contrary, plaintiff was, in my view, a credible witness who made a favourable impression upon me. I am satisfied that he was an entirely honest witness and I accept his evidence that he did not replenish the oil during the relevant period. The underlying facts on which Gravett's theory was based were therefore not established and his theory must therefore be rejected as being impossible.

[69] What was said by Sherlock Holmes over 150 years ago in *The Adventure of the Beryl Coronet* is apposite namely, once the impossible is excluded, whatever remains, however improbable, must be the truth.

[70] Once the possibility of an object having fallen through the oil filler cap into the engine is eliminated then the only inference to be drawn in my view is that the damage must have been occasioned by an object present inside the engine itself. Once that is established as a fact then, it seems to me, the only further plausible inference to be drawn is that such object must have been present inside the engine at the time of its installation into the BMW. In the absence of any forensic examination of the engine it is not possible to

determine what exactly that object was nor, in my view is it necessary to attempt to do so.

[71] I am satisfied therefore that plaintiff has discharged the onus upon him of proving that the damage to the oil pump was occasioned in consequence of an object present in the engine at the time of its installation into the BMW.

[72] I turn then to consider plaintiff's claim for restitution based on the provisions of the Act.

[73] It is necessary to deal firstly with the submission by Mr. de la Harpe to the effect that the BMW motor vehicle and, for that matter, its engine, were "*used goods*" as defined in the Act and that used goods were excluded from the protection afforded to consumers under Part H of the Act.

[74] The term "*goods*" is broadly defined in section 1 as including, *inter alia*, (a) anything marketed for human consumption and (b) any tangible object not otherwise contemplated in paragraph (a).

[75] The definition of "*used goods*" is as follows:

> "'Used goods', *when used in respect of any goods being marketed, means goods that have been previously supplied to a consumer, but does not include goods that have been returned to the supplier in terms of any right of return contemplated in this Act.*"

[76] The relevant sections of the Act contained in Part H thereof, namely sections 53, 55 and 56, providing for the consumer's "*right to fair value, good quality and safety*" refer only to "*goods*". Mr. de la Harpe submitted accordingly that, by necessary implication "*used goods"* were excluded from the provisions of Part H.

[77] It is immediately noteworthy that, although defined, the term "*used goods"* is not again referred to anywhere in the Act. In these circumstances it

is not clear what was sought to be achieved by the inclusion of the definition of the term.

[78] Be that as it may, however, there is in my view, no merit in the above submission.

[79] Section 5(1)(a) provides specifically that the Act applies to "*every transaction occurring within the Republic, unless it is exempted by subsection (2), or in terms of subsections (3) and (4).*" Subsections (2) (3) and (4) are not relevant in this context.

[80] "*Transaction*" is defined as meaning, *inter alia*,:

> "*(a) In respect of a person acting in the ordinary course of business-*
>
> *(i) an agreement between or among that person and one or more other persons for the supply or potential supply of any goods or services in exchange for consideration; or*
>
> *(ii) the supply by that person of any goods to or at the direction of a consumer for consideration; or*
>
> *(iii) the performance by, or at the direction of, that person of any services for or at the direction of a consumer for consideration.*"

[81] The provisions of section 5 are all-encompassing in nature and, in my view, clearly establish a *numerus clausus* of exemptions in terms of subsections (2), (3) and (4) from the application of the Act to transactions. No distinction is drawn either in s 5, or in the definition of "*transaction*", between new and second hand goods. As stated in Naude and Eiselen: Commentary on the Consumer Protection Act at 5 - 3, the point of departure of the Act is that it will apply to all transactions occurring within the Republic.

[82] These considerations in themselves are, in my view, sufficient to dispose of Mr. de la Harpe's contentions. It is, however, in any event clear on a proper interpretation of the Act that the term "goods" as used throughout the Act, including Part H, includes "*used*" or second-hand goods.

[83] In Natal Joint Municipal Pension Fund v Endumeni Municipality 2012 (4) SA 593 Wallis JA set out the proper approach to the interpretation of documents, including statutes, at 603 F – 604B, para 18:

> "*Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document.*"

The learned Judge stated further at 604C – D:

> "*The* 'inevitable point of departure is the language of the provision itself', *read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.*"

[84] In this regard I should mention that it has never been doubted in academic circles that the Act applies to both new and to used or second hand goods. See, for instance, Barnard: The influence of the Consumer Protection Act 68 of 2008 on the Warranty against latent defects, voetstoots clauses and liability for damages 2012 De Jure 455, in particular at 476 – 477; and Naude and Eiselen *supra*. As stated by Barnard, *supra*, at para 37 with reference to s 55(6), the sale of second hand goods and goods sold by pawn brokers are a

good example of goods which may be sold by a seller "*in a particular condition.*"

[85] When the term "*goods*" in Part H is considered in the context of the Act as a whole, having regard to the purpose of the Act and of Part H in particular, there can be no doubt whatsoever, in my view, that the term "*goods*" includes used or second hand goods.

[86] The Preamble makes it clear that the purpose of the Act is, *inter alia*, to "*protect the interests of all consumers*" and to "*ensure accessible, transparent and efficient redress for consumers who are subjected to abuse or exploitation in the market place.*"

[87] Section 2(1) itself provides that the Act must be interpreted in a manner that gives effect to the purposes set out in section 3 thereof.

[88] Section 3(1) provides as follows:

> "(1) *The purposes of this Act are to promote and advance the social and economic welfare of consumers in South Africa by –*
>
> *(a) establishing a legal framework for the achievement and maintenance of a consumer market that is fair, accessible, efficient, sustainable and responsible for the benefit of consumers generally;*
>
> *(b) reducing and ameliorating any disadvantages experienced in accessing any supply of goods or services by consumers –*
>
> *(i) who are low-income persons or persons comprising low income communities;*
>
> *(ii) who live in remote, isolated or low-density population areas or communities;*
>
> *(iii) who are minors, seniors or other similarly vulnerable consumers; or*
>
> *(iv) whose ability to read and comprehend any*

advertisement, agreement, mark, instruction, label, warning, notice or other visual representation is limited by reason of low literacy, vision impairment or limited fluency in the language in which the representation is produced, published or presented;"

[89] Section (4) provides that in any matter brought before Court in terms of the Act:

"(a) The Court must develop the common law as necessary to improve the realisation and enjoyment of consumer rights generally, and in particular by persons contemplated in section 3(1)(b)."

[90] Most importantly for present purposes section 4(3) provides as follows:

"*(3) If any provision of this Act, read in its context, can reasonably be construed to have more than one meaning, the ... Court must prefer the meaning that best promotes the spirit and purposes of this Act, and will best improve the realisation and enjoyment of consumer rights, generally, and in particular by persons contemplated in section 3(1)(b).*"

[91] It is clear from the above that the purpose of the Act is generally to promote and advance the social and economic welfare of consumers and, in the event of any ambiguity in the provisions of the Act, a court interpreting it must prefer the meaning referred to in section 4(3). As stated in Naude and Eiselen *supra* at 2 – 4 "*any ambiguous provision in the Act must be interpreted in favour of the consumer, particularly any consumers who are* 'vulnerable' *as a result of poverty, illiteracy, old age or any other similar disability.*"

[92] To interpret the term "*goods*" in the manner contended for by Mr. de la Harpe would, in the light of the above, be to exclude from the protection of the

Act consumers from the most vulnerable socio-economic sectors of society who would in many cases be unable to access the supply of new, as opposed to second hand, goods. Such an interpretation would therefore have the effect of undermining the purposes which the Act seeks to achieve.

[93] The Act therefore clearly applies to second hand goods and, in the particular circumstances of this case, to the BMW motor vehicle and its engine.

[94] I turn then to consider Mr. Paterson's submissions with regard to the applicable remedies set out in Part H. For purposes of consideration of these submissions I accept, without deciding, that the defect which manifested itself in the second engine falls within the terms of the definition of "*defect*" in section 53(1)(a)(ii), namely "*any characteristic of the goods or components that renders the goods or components less useful, practicable or safe than persons generally would be reasonably entitled to expect in the circumstances.*"

[95] The relevant provisions of s 56 dealing with the implied warranty of quality provide as follows:

> "*(1) In any transaction or agreement pertaining to the supply of goods to a consumer there is an implied provision that the producer or importer, the distributor and the retailer each warrant that the goods comply with the requirements and standards contemplated in section 55, except to the extent that those goods have been altered contrary to the instructions, or after leaving the control of the producer or importer, a distributor or the retailer, as the case may be.*
>
> *(2) <u>Within six months</u> after the delivery of any goods to a consumer, the consumer may return the goods to the supplier, without penalty and at the supplier's risk and expense, if the goods fail to satisfy the requirements and standards contemplated in*

section 55, and the supplier must, at the direction of the consumer, either –

(a) repair or replace the failed, unsafe or defective goods; or

(b) refund to the consumer the price paid by the consumer, for the goods.

(3) If a supplier repairs any particular goods or any component of any such goods, and within three months after that repair, the failure, defect or unsafe feature has not been remedied, or a further failure, defect or unsafe feature is discovered, the supplier must –

(a) replace the goods; or

(b) refund to the consumer the price paid by the consumer for the goods." (My emphasis)

[96] In the light of these provisions it is relevant to bear in mind that the BMW was purchased on 13 September 2011. The second engine was installed during February 2012 and the defect thereto manifested itself some five months later during July 2012, a period of nearly eleven months from the time of purchase of the vehicle. On the face of it therefore, plaintiff was precluded from any reliance on the provisions of s 56(2), the period of six months specified therein having long since elapsed.

[97] Mr. Paterson submitted, however, that the replacement of the first engine with the second engine did not constitute a repair of the BMW motor vehicle as a whole but that the provision of the second engine was in fact a "*new supply*" of goods to plaintiff. He submitted that because the defect in the second engine manifested itself within six months of its installation in the BMW, the provisions of s 56(2) were applicable and that plaintiff was accordingly entitled in terms thereof to return the BMW to defendant and to claim a refund of the purchase of the BMW.

[98] In my view these submissions cannot be upheld.

[99] Firstly, it seems to me that although the engine in itself was a separate component of the motor vehicle which could be removed, repaired and replaced, it was nevertheless an integral part thereof without which the motor vehicle was a mere shell and accordingly defective.

[100] As stated by Loubser and Reid: Liability for Products in the Consumer Protection Bill 2006: A Comparative Critique, Stellenbosch Law Review vol 17, 2006, page 412 at 438 – 9, it "*would seem uncontentious that a complex product is defective even where its defectiveness is attributable only to a fault in one of its components: for example a car is defective even when only its brakes fail.*" *A fortiori*, in my view, when the engine of the car fails.

[101] In my view therefore the replacement of the first engine by the second engine of the BMW was clearly a repair to the BMW. The distinction sought to be drawn between the repair of the BMW and the repair of the engine is, in my view, entirely artificial.

[102] Secondly it was agreed between plaintiff and defendant that defendant would pay for the second engine and defendant did in fact pay therefor. That being so, the agreement could not constitute a "*transaction*" as defined in the Act inasmuch as the "*supply*" of the second engine to plaintiff was not "*in exchange for consideration*". Mr. Paterson's submission that this was a "*new transaction*" cannot therefore be upheld.

[103] Furthermore, the submission, in my view, bears the seeds of its own destruction. If, as argued, the replacement of the engine was not a repair of the BMW, but was an entirely new transaction, in itself unrelated to the repair of the BMW, then, at most, plaintiff would be entitled in terms of s 56(2) only to either the repair or replacement of the engine, or to a refund of the price of the engine. As pointed out above, however, he did not himself pay for the engine which was paid for by the defendant.

[104] In addition, as was submitted by Mr. de la Harpe, plaintiff's claim as formulated in his particulars of claim is not founded upon any agreement

relating to the replacement of the first engine but upon the original agreement for the purchase of the BMW.

[105] Finally, it is necessary to deal with the issue as to whether or not a Court may extend the six month limitation period specified in s 56(2). In this regard the following is stated in Naude and Eiselen *supra* at 56 – 6:

> "*In summary, the position is that the remedies provided for in s 56(2) will only be available for the first 6 months after delivery of the goods. After the expiry of this period the consumer will be able to rely on the residual common-law remedies and, should harm have arisen from the '*defect*' in the goods, a claim for damages under either the common law or s 61. However, the National Consumer Tribunal or Court may make use of its powers in terms of s 4(2)(b)(ii)(bb) to extend the application of s 56(2) beyond six months by making an '*innovative order*' to that effect.*"

[106] The learned authors further criticise the decision in MFC (A Division of Nedbank Ltd) v Botha (unreported case no 6981/13, [2013] ZAWCHC 107(15 August 2013)). In this regard the learned authors state, in note 7 at 56 – 6, that "*the Court held (at para 10) in an* obiter dictum *that a vehicle could not be returned, because the six-month period had lapsed. It is submitted that this approach is not correct, even though it follows the strict letter of the law.*"

[107] In the MFC case *supra* Binns-Ward J stated at para 10, with reference to the respondent's failure to have followed what he considered would have been the correct course of action, as follows:

> "*Unfortunately, and no doubt due to the lack of clarity in the relevant provision and the absence of any reported judicial interpretation thereof, neither of these courses was followed, and the six months' window of opportunity for appropriate action to be taken has passed.*" (My emphasis.)

[108] Section 4(2)(b)(ii) provides as follows:

> "*The Tribunal or Court, as the case may be, must –*
> *(ii) make appropriate orders to give practical effect to the consumer's right of access to redress, including, but not limited to –*
> *(aa) ...*
> *(bb) any innovative order that better advances, protects, promotes and assures the realisation by consumers of their rights in terms of this Act.*" (My emphasis)

[109] I disagree, with respect, with the learned authors' criticism of the MFC case *supra*.

[110] The Legislature, for whatever reason, has expressly decreed a limitation period of six months for the return of any goods in s 56(2). There is no question of s 56(2) being ambiguous in any way. In my view, it is not open to a court, under the guise of making an "*innovative order*", to extend this period. Any innovative order made under s 56(2) must be made within the constraints of the legislation and cannot afford consumers more rights than those specifically provided to them in terms of the Act.

[111] In my view therefore plaintiff's action based on the provisions of the Act cannot succeed.

[112] I turn then to consider plaintiff's claim under the *actio redhibitoria*.

[113] In Holmdene Brickworks (Pty) Ltd v Roberts Construction Co. Ltd 1977 (3) SA 670 (AD) Corbett JA (as he then was), dealing with a latent defect, stated as follows at 683H – 684A:

> "*Broadly speaking in this context a defect may be described as an abnormal quality or attribute which destroys or substantially impairs the utility or effectiveness of the res vendita, for the purpose for which it*

has been sold or for which it is commonly used (see Dibley v Furter, 1951 (4) SA 73 (C) at pp. 80 - 2, and the authorities there cited; also Knight v Trollip, 1948 (3) SA 1009 (D) at pp. 1012 - 13; Curtaincrafts (Pty.) Ltd. v Wilson, 1969 (4) SA 221 (E) at p. 222. Such a defect is latent when it is one which is not visible or discoverable upon an inspection of the res vendita."

[114] See too Odendaal v Ferraris 2009 (4) SA 313 (SCA) in which Cachalia JA stated at 322A – B paragraph 25, with reference to Kerr: The Law of Sale and Lease 3rd Edition, that "*it is now settled that any material imperfection preventing or hindering the ordinary or common use of the* res vendita *is an* aedilitian *defect.*"

[115] I accept in the light of the above that the damage to the oil pump was in consequence of a latent defect in the engine. The question is whether this latent defect was so serious as to justify reliance upon the *actio redhibitoria*.

[116] The English headnote of De Vries v Wholesale Cars en 'n Ander 1986 (2) SA 22 (OPA), which accurately reflects what was stated in the judgment, reads as follows:

"*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.*"

[117] In this regard Combrinck J (as he then was) stated as follows in Du Plessis v West [1998] JOL 202 (N) at para 5, namely:

"*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.*"

[118] In this regard what was stated in De Vries v Wholesale Cars en 'n Ander *supra* at 26A – C is apposite:

"Weens die wyse van konstruksie van 'n motor is daar natuurlik baie onderdele daarvan wat opsigself nie duur of moeilik om te herstel is nie maar wat tog tot gevolg sal hê dat 'n motor nie sal funksioneer indien dit gebrekkig sou wees of onklaar sou raak nie. So byvoorbeeld sou 'n motor nie aangeskakel kon word nie indien 'n pyp wat petrol moet lei na die vergasser sou breek. Die motor sou gevolglik nie kon loop nie en sou derhalwe nie geskik wees vir die doel waarvoor dit gekoop is nie. So 'n defek sal egter gou en teen geringe koste herstel kan word en sal gevolglik nie kansellasie van 'n ooreenkoms regverdig nie. So 'n defek sal ook nie lewensgevaarlik wees nie. Waar die defek egter een is wat lewensgevaarlik kan wees, is die saak anders. In die onderhawige saak toon die getuienis verder dat die defek wat aanwesig was ook nie spoedig herstel kon word nie.

[119] In the present matter, in my view, the latent defect was not of so serious a nature that a reasonable purchaser in the plaintiff's shoes would not have entered into the sale. In my view, a reasonable person in plaintiff's shoes, being aware that he was purchasing a second hand motor vehicle, albeit an expensive one, for a price very considerably less than a new vehicle of that make would have been conscious of the fact that it might experience mechanical problems from time to time which were not to be expected in a

brand new vehicle of that make. Compare: Addison v Harris 1945 NPD 444; Lakier v Hager 1958(4) SA 108 (T).

[120] In the present matter the damage to the oil pump, once diagnosed, was easily remedied for an amount of approximately R15 000,00, an amount which, whilst seen in isolation, is not inconsiderable, is however, relatively inconsequential when viewed against the purchase price of R470 000,00 in respect of the BMW. It would seem that plaintiff's antipathy towards the second engine and his loss of faith in it has been coloured to a considerable extent by his unfortunate experience with the first.

[121] In my view, therefore, the plaintiff's claim based on the *action redhibitoria* must also fail.

[122] This is an unfortunate matter. Most of the trial was taken up with the issue as to the cause of the damage to the oil pump, an issue on which plaintiff has been successful. At the end of the day, however, having regard to the result, the plaintiff will have to bear the costs of the action.

[123] Accordingly the plaintiff's claim is dismissed and judgment is entered in favour of defendant with costs of suit.

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J.D. PICKERING
JUDGE OF THE HIGH COURT

Appearing on behalf of Plaintiff: Adv. T.J.M. Paterson S.C.
Instructed by: Wheeldon Rushmere and Cole, Mr. Brody

Appearing on behalf of Defendant: Adv. D.H. De la Harpe
Instructed by: Borman and Botha Attorneys, Ms. Jagga