

REPORTABLE (50)

Judgment No. S.C.

9.6/84

Civil Appeal No.

LILIAN F. LOURENCO v RAJA DRY CLEANERS AND STEAM LAUNDRY (PVT) LIMITED

SUPREME COURT OF ZIMBABWE,

DUMBUTSHENA, CJ, GUBBAY, JA & McNALLY, JA,

HARARE SEPTEMBER 27 & OCTOBER 30, 1984.

C.N. Greenland, for the appellant

J.B. Colegrave, for the respondent

DUMBUTSHENA, CJ: The appellant, hereinafter referred to as the defendant, who resides in Harare, advertised in The Herald the sale of a two-ton Daihatsu truck. The respondent, hereinafter referred to as the plaintiff, a company doing business in Mutare, instructed Mr Ranchod of Harare to buy the truck. Mr Ranchod took with him Mr Holland, a motor mechanic, who inspected the motor vehicle by looking underneath and opening the bonnet. They drove the motor vehicle round the block. They were both satisfied with the condition of the motor vehicle. Mr Ranchod was then handed a list of repairs, Exhibit 1, carried out on the engine and other minor repairs. Mr Lourenco, the defendant's husband who was responsible for selling the car, told Mr Ranchod that it was in good condition and good working order.

Mr Ranchod paid the purchase price in the sum of \$3 800 to Mr Lourenco, Mr Lourenco's driver drove the truck to Mr Ranchod's house, a distance of 8 kilometers.

On 27 June 1981 Mr T.G. Raja, the Managing Director of the plaintiff company, and Mr K.G. Raja left Mutare for Harare. They looked at the truck which was parked at Mr Ranchod's house. It appeared to them to be in good condition.

That evening Mr T.G. Raja, Mr Ranchod's father-in-law, and Mr Ranchod left Harare for London in England. Mr K.G. Raja arranged for the truck to be driven by Mr Nathan Matambanashe to Mutare. Mr Matambanashe was employed by the plaintiff as a driver.

On 28 June 1981 Mr Matambanashe started on his journey to Mutare. The driver did not know his way from Ridgeview to the Mutare Road. Mr Mukesh Raja led him by driving ahead of the truck. Mr Mukesh Raja drove up to Sir James MacDonald Avenue and turned right into Samora Machel Avenue. He then proceeded along Samora Machel Avenue, followed by Mr Matambanashe.

He testified that he was driving at about 30 k.p.h, at the maximum. At Haddon Motors Mr Mukesh Raja drove back to town.

Mr Matambanashe then drove along the Mutare Road until he stopped the truck near what was the Beverley Rocks Motel, now the Government Training Centre. He stopped the truck because he felt extreme heat from underneath the seat and he observed smoke coming out from the same direction. He pulled off the road and stopped immediately.

After waiting for ten to fifteen minutes Mr K.G. Raja arrived. He lifted up the seat because the engine was situated underneath the seat.

Mr Matambanashe noticed that there was oil all over the engine, oil was coming out and the water in the radiator was boiling. Mr K.G. Raja said he noticed both the water and oil boiling.

Mr K.G. Raja drove back to town and informed Mrs Lourenco of the breakdown. They left the defendant's employee looking after the truck while they proceeded to Mutare. When Mr K.G. Raja arrived in Mutare he said he made a telephone call to Mr Lourenco who said he would look into the matter and do something about it. Subsequently the truck was towed to Mr Lourenco's house but no repairs were carried out.

The central point in this appeal is whether there was an implied warranty as to the condition of the motor vehicle, or whether the truck was sold voetstoots as is contended by the defendant.

A reading of the plaintiff's particulars of claim as outlined in its declaration projects the fact that the defendant had made express warranties as to the condition of the truck. It was pleaded as follows

"Defendant warranted and represented, on two separate occasions to Mr Ranchod and Mr K.J. Raja respectively, that the truck was in good order and condition and had no defects. The warranty was that the vehicle had had certain work done to it, that it had no defects and that it was in perfect working order."

To these allegations the defendant made a bare denial and also asserted that the truck had been sold voetstoots.

It appears that at some time during the plaintiff's case counsel for the plaintiff indicated his intention to amend the declaration. However, the amendment was handed in after the defendant's counsel had applied for absolution from the instance on the ground that the plaintiff's evidence had not revealed that the defendant ... had warranted and represented to the plaintiff that the vehicle was in good, order and condition and had no defects".

In my view although the amendment did not precisely set out the circumstances alleged as an implied warranty, the amendment was sufficiently clear and was amplified by the evidence.

Paragraphs 3 and 4 of the declaration were amended thus:-

- "1. In paragraph 3 thereof as read with Plaintiff's Further Particulars by the deletion of 'In or about June 1981, Defendant' and the substitution of 'In or about June 1981, Defendant's husband, acting upon Defendant's behalf impliedly or expressly'.
2. In par. graph 4 thereof as read with Plaintiff's Further Particulars by the deletion of 'Defendant agreed to have the vehicle repaired at

his expense and Defendant accordingly re-took possession of the vehicle' and the substitution of 'Defendant's husband, acting upon Defendant's behalf re-took possession of the vehicle and on the 27th June 1981, or thereafter impliedly or expressly agreed to have the vehicle repaired at his expense.'"

In passing let me say that the plaintiff did not seem to be aware of the particulars upon which its claim was based. The same can be said of the defendant because of the failure of counsel, who was not Mr Greenland, to cross-examine Mr Ranchod on the defence of voetstoots.

One of the essentials of pleading is that the declaration or plea must set out precisely that which is alleged. The overriding requirement of proper pleading is:-

"... that the litigation between the parties ... should be conducted fairly, openly and without surprises and incidentally to reduce costs."

See Astrovlanis Compania Naviera S.A. v Linard [1972] W.L.R. 1414 at 1421.

As already pointed out at the close of the plaintiff's case counsel for the defendant applied for absolution from the instance. The court, without adjourning to consider its judgment, dismissed the application because the learned judge found that there were "enough grounds on which a reasonable court might find judgment in the long run for the Plaintiff".

The learned judge indicated when she refused the application that reasons for such a ruling would be incorporated in her judgment. She, in her attempt to give such reasons, considered the evidence in its total effect on the trial as a whole.

There is, however, no doubt in my mind that at

"... the close of plaintiff's case there was evidence upon which a court, applying its mind reasonably, could have come to the conclusion that ...,"

there was an implied warranty. See Mazibuko v Santam Insurance Go Ltd and Anor 1982 (3) SA 125 (AD) at 133.

In that case CORBETT JA said at 132H:-

"In an application for absolution made by the defendant at the close of the plaintiff's case the question to which the Court must address itself is whether the plaintiff has adduced evidence upon which a court, applying its mind reasonably, could or might find for the plaintiff; in other words whether plaintiff has made out a prima facie case. This is trite law."

However, it was the defendant's contention that absolution should have been granted at the end of the plaintiff's case because the "Plaintiff's cause of action was founded in express warranties allegedly given by Defendant which induced him to purchase the vehicle" and yet it was the plaintiff's evidence at the trial that no warranties of any kind were given.

While that was so, there was still the question of an implied warranty to be considered. It must be remembered that the onus of proof in a criminal case is higher than in a civil case. This criterion in the difference of the standard of proof applies when an application for absolution is made at the end of the plaintiff's case as it does when the court considers final judgment at the end of a trial.

The approach by the court to an application for absolution from the instance was laid down in the case of Gascoyne v Paul and Hunter 1917 TPD 170 by DE VILLIERS JP at 173 as follows

"The question therefore is, at the close of the case ... was there a prima facie case against the defendant Hunter; in other words, and was there such evidence before the Court upon which a reasonable man might, not should, give judgment against Hunter?".

It must be remembered too that an application for absolution stands on the same footing as a submission of no case to answer in a criminal case, except for the difference in the standard of proof pointed out above. It may be in this particular case the defendant might have succeeded had she not elected to give evidence after the application for absolution from the instance was refused. In Supreme Service Station (1969) (Pvt) Ltd v Fox & Goodridge (Pvt) Ltd 1971 (1) RLR 1 at 4 C—F. BEADLE CJ considered the approach in Gascoyne v Paul and

Hunter, supra and commented as follows

"In that case, it was pointed out that an application for absolution from the instance stands on much the same footing as an application for the discharge of an accused at the close of the evidence for the prosecution but it is stressed (see p 173 of the judgment) that it would, indeed, be curious if, in civil cases (the court) were to apply a more stringent rule of practice than in criminal cases. It would seem to me that, as in a criminal case the onus of proof is always higher than in a civil case, evidence which in a criminal case would be insufficient to justify refusing an application for the discharge of an accused might well in a civil case be sufficient to justify refusing an application for absolution from the instance. Gascoyne's case stresses that it is perfectly competent for a court to refuse an application for absolution from the instance when the application is made at the close of the plaintiff's case, but to grant it if the defendant then promptly closes his case and renews the application without calling any evidence at all. There is no inconsistency in two such diametrically opposed orders, though the evidence before the court in each application is identical."

The question is whether absolution should have been granted merely because the plaintiff had not pleaded an implied warranty and the amendment to the pleadings was handed in at the end of the application for absolution.

It appears to me that where there is evidence which tends to show that an implied warranty could be inferred from the surrounding circumstances a refusal to grant absolution is justified. In my opinion an inference justifying an implied warranty could have been drawn from the plaintiff's evidence at that stage of the proceedings. The learned trial judge, in considering whether there was evidence to establish a prima facie case, went beyond that and evaluated the evidence adduced by the plaintiff's witnesses as if she was considering a final judgment. She said:-

"I was of the view that the plaintiff company must have succeeded at the close of its case to show that defects existed on the vehicle at the time of the sale which would have gone against its decision to purchase the vehicle, or that the vehicle was not fit for the purpose for which it was purchased - *Lakier v Hager* 1958 (4) SALR 180 at 181.

Clear was the evidence of Mr Ranchod that Mr Lourenco gave no warranty or representation as to the soundness of the vehicle. Equally clear was his evidence to a question put to him by the Court, that Mr Lourenco told him the vehicle was in good working condition.

This, coupled with the list, Exhibit 1, which list enumerated the extent of the repairs carried out on the vehicle, motivated Mr Ranchod into buying the vehicle for the plaintiff company. Any knowledge that the vehicle would break down within a distance of ten miles would have gone against the decision of any reasonable man from purchasing the vehicle, Mr Ranchod not excluded.

I felt that whatever the defect, it was latent and not obvious to the cursory inspection of the vehicle conducted by Messrs Holland and Ranchod."

The learned judge, however, cannot be criticised for not allowing the application for absolution. It would have been wrong for the court to have rejected the plaintiff's evidence as summarised above. In *Claude Lights (S.A.) Ltd v Daniel Neon* at ) stated what appears to G-H MILLER AJA (as he then was) stated in the **circumstances** of this case.

me to **be** applicable in the instance the test to establishes what would finally led by plaintiff established, but whether there be required *to* be Court, applying its his evidence. Evidence could or to find "plaintiff. (*Gascoyne v Paul and Hunter*, 1917 TPD 170 at p 173; *Ruto Flour Mills (Pty) Ltd v Adelson* (2), 1958 (4) SA 307 (T))." See also Herbstein and Van Winsen: *The Civil Practice of the Superior Courts in South Africa* 3 ed p 464, and *Gandy v Makhanya* 1974 (4) SA 853 (NPD) at 856

It is important to bear in mind that a plaintiff can avoid absolution even if he cannot persuade the court hearing the application that there exists an actual preponderance of probability in his favour.

On the evidence on the record it is my view that the learned judge was correct in refusing the application for absolution because she was not satisfied that a reasonable court could not draw the inference for which the plaintiff contended.

There was the fact of substantial repairs effected to the engine. Besides, Mr Lourenco had uttered remarks about the condition of the motor vehicle, and more importantly there was the circumstance of its breaking down about ten miles from Mr Ranchod's house the first day the plaintiff drove it. This evidence, coupled with the denial of a. voetstoets clause, led to the only inference which the learned judge was entitled to draw, which is that an implied warranty could be presumed.

Let me now deal with the sixth ground of appeal which is to the effect that the "Learned Judge erred in Law in granting Respondent's application to amend its pleadings".

It was contended by Mr Greenland, who appeared for the defendant, that the court a quo ought not to have granted leave to the plaintiff to amend its pleadings after an application for absolution from the instance. No authorities were cited in support of that contention.

I have already pointed out that it is not clear at what stage the amendment was applied for. What is clear is that it was handed in in written form after the ruling on the application for absolution.

A reading of Rule 132 of Order 20 of the High Court (General Division) Rules, 1971 makes it clear that a party can apply to amend his pleadings at any stage of the proceedings. Rule 132 reads

"Failing consent by all parties the court may, at any stage of the proceedings, allow either party to alter or amend his pleadings, in such



manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real question in controversy between the parties."

The learned judge correctly summarised the effect of authorities on this subject. The main aim and object in allowing an amendment to pleadings is to do justice to the parties by deciding the real issues between them. The mistake or neglect of one of the parties in the process of placing the issues before the court and on record will not stand in the way of this unless the prejudice caused by the other party cannot be compensated for in an award of costs.

The position is that even where a litigant has delayed in bringing forward his amendment, as in this case, this delay in itself, in the absence of prejudice to his opponent which is not remediable by payment of costs, does not justify refusing the amendment.

See S.A. Steel Equipment Co (Pty) Ltd and Ors v Lurelk (Pvt) Ltd 1951 (4) SA 167 (TPD) at 172G; Frenkel, Wiser & Co Ltd v Cuthbert 1947 (4) SA 715 (CPD) at 718; Trans-Drakensburg Bank Ltd (Under Judicial Management) v Combined Engineering (Pty) Ltd and Anor 1967 (3) SA 632 (D CLD) at 638a - 642H; Levenstein v Levenstein 1955

(3) SA 615 (SR); and Mabaso and Ors v Minister of Police and Anor 1980 (4) SA 319 (WLD),

I now turn to the second ground of appeal'.

It is stated that the learned judge erred in finding that the vehicle in question had not been sold "voetstoots".

I have already mentioned that Mr Ranchod, who bought the motor vehicle as the plaintiff's agent, was never closely cross-examined on the voetstoots sale. Some questions on a voetstoots sale were put to a witness who was not present at the sale when that issue was thus belatedly brought up by the defendant's counsel. The impression this omission induces in one's mind is that the defence of voetstoots was never a strong part of the defendant's case. This is how the defendant's counsel

handled the issue when cross-examining the plaintiff's witnesses:

Mr Ranchod was asked during his evidence-in- chief the following questions

"Q. Is there any truth in the assertion that the sale was on a voetstoots basis, that is on as it stands basis? A. No, Mr Lourenco did not mention that.

Q. You are quite sure? A. Yes.

Q. Would you have been prepared to buy the vehicle for your father-in-law if you would have known that it was on a voetstoots or as it stands basis? A. I do not think so I could buy it myself unless I had contacted my father-in-law again and told him exactly that these are the conditions and whatever he told me then of course I would act upon.

Q. But you are quite sure that you were not told that it was a voetstoots sale? A. No, there was no mention of that."

In spite of Mr Ranchod's denial that the sale of the motor vehicle was on a voetstoots basis, the issue was not vigorously pursued and yet Mr Ranchod was the man who had negotiated the contract of sale of the motor vehicle with Mr Lourenco.

Mr T.G. Raja testified that he would not have purchased the motor vehicle had he been told, that basis. In cross-examination a question was put to him on this important issue as follows:-

"And you also say you would not have purchased the vehicle had it not been or had he told you specifically that it was a voetstoots sale?".

He replied "Yes". That was the end of the cross-examination of Mr T.G. Raja on this important defence.

Mr T.G. Raja is said by the defence to have been told by Mr Lourenco during a telephone conversation that the motor vehicle was being sold "as is". Mr Lourenco was asked in his evidence-in-chief :-

"Q., And what was agreed on the phone? A,  
Well, they only asked the question, 'What is the condition of the truck like?'. And I told them exactly that I am selling this truck, it was a Daihatsu 2 tonne panel van. The price was \$4 000, but I did mention there also at the same time that I have done the repairs, you know, like an engine, the gear box and few other places, etc. I have listed down all these things, you know and at the same time I also mentioned that I would be selling the truck as is.

Q. Did you mention that on the telephone at that stage? A. I did.

Q. Are you quite certain about that? A.  
I am quite certain.

Q. Would you repeat what you said? A,  
I said that I will be selling this truck as it stands.

Q. Did you say as it stands or as is, which is it? A. Well, as is."

The telephone conversation between Mr Lourenco and Mr T.G. Raja was not put to Raja in cross-examination.

If that conversation had taken place the defendant's counsel would have asked Mr T.G. Raja about it.

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In my view if Mr T.G. Raja had agreed to buy the motor vehicle voetstoots. Mr Ranchod would not have taken with him a mechanic, Mr Holland to examine the truck. Further it is inconsistent for Mr Lourenco to sell the motor vehicle voetstoots and still insist that the purchaser look at the amount of work he had done on it. He was asked "And did you repeat to him (Mr Ranchod) any conditions of the sale?".

He replied- "Well, the condition of the sale was that I was selling the truck as is, that they might look at all the aiiiount of work that I had done on the truck and I was selling the truck as is and this is exactly what I used."

I agree with Mr Colegrave's submission that the assertion that the motor vehicle was in good condition is inconsistent with its being sold voetstoots, because it was in the defendant's interest to divulge to Mr Ranchod that it was in good working condition in order to enhance the sale, more so when the repair to the engine was a "masterpiece". And Mr Lourenco did agree under cross-examination that he suggested to Mr Ranchod that the motor vehicle "was in a good and sound condition - in a running condition.

In my view on this evidence the court a quo was justified in rejecting the defence evidence. Once that evidence was rejected:-

the seller is presumed to warrant that at the time of sale the thing sold is free from all latent defects, for in this instance there was no question of the car having been sold 'as it stands...."

per SEARLE J in Goldblatt v Sweeney 1918 CPD 320 at 323

However, Mr Greenland, who appeared for the appellant, contended that the latent defect did not exist at the time of sale. In support of his contention he relied on the fact that Mr Ranchod had brought with him Mr Holland, a motor mechanic, who inspected the motor vehicle before it was bought.

In support of his submission Mr Greenland cited Lakier v Hager 1958 (4) SA 180 (TPD). That was a case in which the plaintiff had purchased a nineteen year old car. He asked for a roadworthy certificate.

The defendant gave him one which had been issued a few days before the sale. The plaintiff was satisfied to accept the roadworthy certificate as a performance of the condition. Before buying the car he tested it by driving it, and was satisfied with its performance.

Four days after taking delivery he drove it. He swerved to avoid a pool of water and a traffic inspector stopped him and asked him to obtain a roadworthy certificate. There was nothing relating to the swerving which indicated its performance on the road. When it was tested a roadworthy certificate was not granted. He then sent it to a garage and after that he sent it to another garage for examination. After receiving an adverse report he rescinded the sale and claimed the return of the purchase price. The purchase price was not returned. He then sued for rescission, basing his claim on latent defects.

In his judgment RAMSBOTTOM J (as he then was) remarked at 184 E-H: -

"The man is buying a very old car, and he must give it a proper inspection. If he wishes to rely on defects existing at the time of the sale which are latent then, I think, he must show that he gave the car a proper inspection, and a proper inspection involves examining, at any rate, the "external part of the car, whether that is underneath or on top. I think; that one of the things that a person buying an old second-hand car of this kind might be expected to look for would be a cracked chassis, and if that had been done in this case it would immediately have been discovered. But assuming that I am wrong in this and assuming that the cracked chassis was a latent defect, it seems to me that there is no evidence to show that this was material. The evidence is that the chassis might last a long time even with the crack in it, although Mr Walker, who said that, said that he would consider a car with a cracked chassis as not roadworthy. But there is a great difference between saying that a car with a cracked chassis is not

roadworthy and saying that a car with a cracked chassis is not fit for the purpose for which it was sold. There is no evidence that this crack could not have been repaired by welding or in some other simple way for a few shillings."

Lakier v Hager, supra., is distinguished on the facts from the instant case. It is true that Mr Holland examined the motor vehicle. He had a look at the vehicle, under the vehicle and examined the external part of the engine which was, clean no doubt because it had been overhauled. He examined the oil and declared it clean. He looked at the list of repairs and declared that a lot of work had been done.

He drove the truck round the block. What is important is that the examination was external. The parts that went wrong - the three pistons and the conrods - were inside the engine. Mr, Holland's external examination of the engine could not have revealed any latent defects.

The vehicle was only driven from Mr Lourenco's house to Mr Ranchod's house (a distance of only 8 kilometres) and from Mr Ranchod's house to near Beverley Roacks Motel (a distance of about 10 miles) where it broke down. I find nothing that could be criticised in the manner Mr Matambanashe drove the truck on his way to Mutare.

He had been instructed to drive carefully because the engine had just been overhauled.

In my opinion had the plaintiff's agent known that the pistons and conrods were going to break after driving a short distance, he would not have bought the motor vehicle. There is evidence which tends to support the view that a reasonable man could not have bought the motor vehicle knowing the defects that led to its breakdown.

Now let me turn to the onus of proof. I agree with Mr Greenland that the onus of proving that the defect existed at the time of the sale is on the buyer. (See Seboko v Soll 1949 (3) SA 337 (TPD) at 350). However, RAMSBOTTOM J said on

the same page

"This review of authorities shows, in my opinion, that there is no rule in South Africa by which the onus of proving that no defect existed at the time of the sale is thrown on the defendant.

I do not need to consider what the effect is of a presumption of law - a matter which was touched on by STRATFORD, C.J., in Tregea and Another v Godart and Another (1939, A. D. 16, at p. 32) and by the same learned Judge in Estate Weiner v Weisholtz (1945, A.D. 95). In my opinion the onus of proving that the defect existed at the time of the sale is on the buyer. That is an essential fact which he must allege in his declaration, and the onus of proof is placed upon him by the pleadings - it never shifts. See Pillay v Krishna and Another (1946, A.D. 946 at pp 952 and 953) and Klaassen v Benjamin (1941, T.P.D. 80 at p 8.5). The fact that a defect in the article *or* animal purchased is discovered shortly after the sale is one of the circumstances from which an inference may be drawn that the defect existed at the time of the sale; it has no greater efficacy. If at the close of the case there is no balance of probability in favour of the buyer, he must fail."

Let me deal with some of the evidence adduced by some of the witnesses. From that evidence it is clear that Mr Lourenco genuinely believed that the motor vehicle was in a good condition and in good running order Mr Khan said after the engine had been overhauled - it was a masterpiece. It is true that he testified that he knew of no defect, The mere saying that the motor vehicle, a second-hand one, was in good condition has been the subject of many comments in a number of cases. It has been held that that phrase is not an express warranty.

In Addison v Harris 1945 NPD 444 -a case in which the respondent hired to the appellant a much used Ford lorry and in which the respondent admitted at the trial that he had told the appellant that the lorry was in good condition at the time the contract was entered into — in giving effect to the phrase "in good condition" SELKE J said at 448:-

"Now it seems to me that, in the circumstances, it would be wrong to interpret that expression in the sense in which the same expression might be interpreted in relation to a brand new vehicle.

I think the expression must be construed very much in the light of the circumstances in which it is used; and thus, in my view, when used with reference to an oldish second-hand vehicle, it means that the vehicle is in good condition for what it is, viz, an old, used vehicle, which in turn imports little more than that the maker of the statement knows of no defect then existing in the vehicle, or of any particular thing likely to cause it to break down in the immediate future. And if such a statement, when made with reference to an oldish, used vehicle, imports any promise as to the future - which I am inclined to doubt - it seems to me that it ought not normally to be construed as an undertaking or promise that the vehicle will not suffer any such sudden temporary breakdowns as notoriously happen to old, used motor vehicles. At the most, I think, such a statement may possibly import an undertaking that the vehicle will not, with ordinary and proper use,-/

"use, break down in a final sense in the then Immediate future. In the present instance. that the statement which respondent admittedly made, was not construed by the parties as any promise or undertaking against temporary breakdowns or breakages, is strongly suggested by the express term of the contract itself, whereby the appellant specifically undertook liability for 'breakages'"

While agreeing with what the learned judge stated in the above passage, I distinguish it from the present case. It is true "a good condition" cannot be said to constitute an express warranty. In the instant case it is important to examine the surrounding circumstance including the expression that the car

was in good condition, to find out whether an implied warranty could be inferred.

Let me pause here to repeat what WATERMEYER CJ said in Hackett v G & G Radio and Refrigerator Corporation 1949 (3) SA 664 (AD) at 685 -686:-

"It is, however, sufficient for the purposes of this judgment to say that the actio redhibitoria, even if it does not include an action for rescission



based on an express warranty against latent defects or on the actual knowledge of such defects on the part of the seller, does at any rate include an action for rescission based on the ground of a latent defect of which the seller is unaware and in respect of which he has given no given no express warranty."

This is the position in this case. The defendant did not, so it appears from the evidence, give an express warranty against latent defects. I can presume in her favour that she had no knowledge of such defects.

The plaintiff succeeded "on the ground of a latent defect of which the seller" was "unaware and in respect of which (she) has given no express warranty.'

These are the surrounding circumstances from which an inference may be drawn: Mr Lourenco handed Mr Ranchod a list of major repairs to the engine and showed him minor defects that needed attention. One can say that this was not an ordinary second-hand car because it had a renewed, overhauled engine. The list of the spare parts, Exhibit 1, used in overhauling the engine shows that a major reconditioning exercise was carried out. Although Exhibit 1 shows that no new conrods were replaced Mr Khan testified that he discovered, when he had put in the pistons and examined the conrods, that the Number One and Number Four conrods were wrong. He sent Mr Lourenco to get conrod belts. It is not clear from his evidence whether he put in new conrods or only conrod belts. What is clear, however, is that a major repair exercise was carried out and because of that, or the impression gathered from it, the engine was almost new. It was at that point not an ordinary second-hand car.

What is important is that with the work put in on the repair of the engine, together with the remarks that the motor vehicle was in good condition and in good working order, it becomes easy to infer from a combination of these factors that there was an implied warranty that the motor vehicle had no latent defects.

This inference is further strengthened by the fact that Mr

Lourenco showed Mr Ranchod minor defects that needed to be attended to, thus implying that the rest of the vehicle had no latent defects. Besides, the motor vehicle had only been driven from Mr Lourenco's house to Mr Ranchod's house by Mr,

Lourenco's driver who had been given instructions by Mr Khan on how to drive it. And then Mr Nathan Matambanashe drove it, as the evidence reveals, at about 30 kph on the Mutare road, for a distance of about ten miles. There was no sudden decline on that road to require the driver to rev the engine out at neutral as was suggested by Mr Khan.

Mr Khan was asked

"Can you think of any reason why he should have put the vehicle in neutral?

A. Well, I can't the reason, but I am merely stating if he wanted get momentum from the vehicle and cover his speed that he was doing, whatever it may be, I can't tell you. All I know is that there is a decline there and you can put a vehicle in neutral and let it roll down to the bottom and when you get to the top, bring it back in gear.

Q. You can't think of any reason why it should have been done? A.

Well, I don't know.

I can't comment on that because I was not present."

This is not a case where one expects "temporary breakdowns in old and much-used machines. Such breakdowns may result from ordinary wear and tear, notwithstanding that the machine is not used in any improper way" per SELKE J in Addison v Harris, supra, at 449.

In the instant case the breakdown was after the engine had been overhauled, and the breakdown consisted among other things of pistons and conrods which had been fitted in the engine. The motor vehicle was not being over-revved of revved in low gear.

In my judgment the fact that the motor vehicle broke down shortly after the sale is one of the circumstances from which an inference may be drawn that the defect existed at the time of the sale.

It justifies the inference that it had a latent defect at that time. See Seboko v Soll, supra, at 350.

It is my considered view that the plaintiff has discharged the onus of proof which was upon him right through the trial.

I run now to the question of costs up to the stage when the plaintiff applied to amend the declaration.

Mr Greenland submitted that the judge a quo should have awarded the defendant costs up to the stage when the defendant was faced with a completely new cause of action, that is, when the plaintiff's application to amend the declaration was granted. The plaintiff sought to obtain the defendant's consent to the proposed amendments: The defendant refused. It can be said that by raising the defence of voetstoots the defendant invited the amendment.

Generally a party that gives notice of amendment is liable to pay the costs occasioned to the other party. Rule 115 of Order 17 of the High Court (General Division) Rules, 1971, dealing with amendments of a claim stated in summons, says:-

"In his declaration a plaintiff may alter, modify or extend his claim or claims as stated in the summons and the summons shall thereupon be deemed to be amended in accordance with the claim or claims made in the declaration:

Provided that where the defendant shows that he is prejudiced by such amendment the court make such order as to costs or otherwise as the justice of the case demands."

If the opponent has not consented and has good grounds for opposing the application, the applicant will be ordered to pay his opponent's costs.

In this case there was no postponement to enable the defendant to reply to the amended declaration. Had there been, the plaintiff would have been ordered to pay wasted costs. Therefore, the allowing of the amendment did not involve extra wasted costs.

The defendant did not even amend her plea. The judge *a quo* was, therefore, entitled to refuse the defendant her costs. BRISTOWE J put it thus in Van Os v Breda 1911 TPD 165 at 169

"With regard to the costs, the only point which has been argued is one which is said to arise by reason of the Court having allowed an amendment to the declaration, expressly raising the question of waiver. It is suggested that, where the Court allows such an amendment, the plaintiff ought to pay all the costs up to the date of the amendment.

I have never before heard such a suggestion.

Where an amendment renders a postponement necessary, the costs, thrown away, are usually allowed to the defendant; that is common practice. But here the objection that written notice had not been given was merely a technical objection. Amending the declaration (even if it was necessary to amend it, which I doubt) so as to allege a waiver, did not make any difference to the case which the defendant perfectly well understood the Court was going to try. No costs have been wasted by the amendment, and I do not think it ought to affect the decision as regards costs."

See also Herbstein and Winsen.' The Civil Practice of the Superior Courts in South Africa.

In my view the refusal by the judge *a quo* was based on right principles. The appeal on this issue of costs of amendment cannot, therefore, be entertained.

Accordingly the appeal is dismissed with costs,

GUBBAY, JA: I agree.

McNALLY, JA: I agree.

Ali Ebrahim Esq., appellant's legal representatives

George, Seirlis & Associates, respondent's legal representatives