

IN THE SEYCHELLES COURT OF APPEAL

LARUE GLASS WORKS (PTY) LTD

APPELLANT

VERSUS

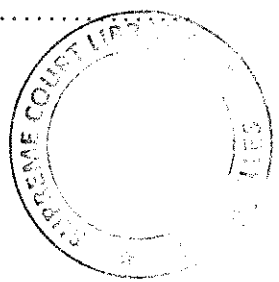
MR PHILIP REDDY

RESPONDENT

Civil Appeal No. 22 of 1997

*(Before: Silungwe, Ayoola & Adam JJA)*

Mr. J. Renaud for the Appellant  
Mr. P. Boulle for the Respondent



JUDGMENT OF THE COURT

Delivered by Ayoola, J.A.

This appeal arose from a judgment entered in favour of Mr. Philip Reddy ("the respondent") against Larue Glass Works (Pty) Ltd ("the appellant"), in an action against the appellant for breach of warranty in a total sum of SR145,510.70. The respondent had claimed in the Supreme Court the sum of SR169,309.70 alleging by his plaint as follows: that he bought a fishing boat from the appellant for the price of SR89,184.70 sometime in August, 1994. When using the boat for the second time on a fishing trip the boat broke down and had to be returned to the appellant for repairs. It broke down a second time after it had been repaired on the first occasion and had to be returned to the appellant once again. The appellant, it was alleged, failed to repair it. The basis of the respondent's claim was pleaded thus:-

"The engine of the boat was defective and as a result of the breach of warranty, the Plaintiff has suffered loss and damages for which the Defendant is liable...."

The respondent claimed a refund of the sale price, damages for loss of use, refund of the licence fee and moral damages.

Bwana J. who heard the case enumerated the problems described by the respondent when the boat was taken out by him on fishing trips as follows:-

- “1. During the first trip, the silencer got burnt and the starter was defective. Thereafter the engine could not function well.
2. During the second trip, water entered the boat.
3. During the third trip again, the injector could not function despite earlier repairs by the defendant after the first trip. Water entered the starter.
4. During the fourth trip, again there was smoke in the silencer and some other parts.
5. With continued problems despite repairs, after the fifth trip, the plaintiff decided to hand back the boat to the defendant.”

The learned judge, starting from a position that it was not in dispute that the “cause of this action is some defects in the engine of the boat”, went on to pose what he considered to be the main question in the case thus:

“Therefore, the engine defects - were they latent defects or could have been discovered or could have reasonably come to the notice of the plaintiff.”

The learned judge referred to the definition of “latent defect” as contained in Black’s Law Dictionary (6<sup>th</sup> Edition) thus:

“A hidden or concealed defect one which could not be discovered by reasonable and customary observation or inspection; one not apparent ... on face of goods, products ... defect of which owner has no knowledge or which in exercise of reasonable care, he should have no knowledge ...”

He took the view that had the appellant exercised reasonable care he should have had knowledge of the "said defects." The learned judge apparently approaching the matter, first, on an assumption that it was common ground that there were defects in the engine, and, secondly, on the view he took that once the defects with reasonable care should have been known to the appellant, held that the appellant was liable for selling the engine to the respondent. It is evident that this approach was questionable. The prefatory remarks of Mr. John Renaud, learned counsel for the appellant, that:-

"The learned trial judge did not fully considered (sic: consider) the case for the appellant, that he misconstrued the law applicable to the case and that the evidence of the plaintiff and his witnesses prove that there was no latent defect in the engine of the boat."

seem directed at the approach of the learned judge to the case and to his conclusion that the engine that the appellant "bought on behalf of the plaintiff and had fitted on the boat turned out to be defective, making the boat unfit for the purpose for which it was intended, that is, fishing. Furthermore, it is evident before this court that the plaintiff was not made aware by the defendant of the existence of the warranty."

On this appeal from the decision of the learned judge, it was argued by Mr. John Renaud, learned counsel for the appellant that the evidence established that at the time that the boat was delivered the engine was working properly and that there was no latent defect or any defects whatsoever attributable to the seller. Counsel for the appellant went further to question the propriety of the reliefs granted by the judge. However since such argument cannot be accommodated within the three terse grounds of appeal raised by the Memorandum of Appeal, which were directed at questioning the conclusion of the judge on liability only, this further argument cannot be entertained.

Mr. Boulle, learned counsel for the respondent, argued in response that there was evidence on which the judge could reasonably come to the conclusion that the appellant was liable.

One of the two principal obligations of the seller in a sale transaction is the obligation of warranty of the thing sold (see Article 1603 of the Civil Code)

The nature and extent of the obligation as well as the consequence of its breach have been clearly spelt out in the Code. The starting point therefore in a consideration of the obligations of the seller where a breach of warranty is the basis of the plaintiff's claim is the Civil Code. Article 1625 of the Civil Code ("the Code") provides that:-

"The warranty by which the seller is bound to the buyer has two objects the first is to ensure the peaceful possession of the thing sold; the second, to protect the buyer against any hidden or latent defects of the thing sold. The court shall have power to order that any damage suffered as a result of a breach of warranty shall be recovered by the buyer."

Article 1641 of the Code provides that -

"The seller shall be bound by the warranty against latent defects of the property sold which render it unfit to use for the purpose for which it was intended or which reduce its use so substantially that the buyer would not have bought it or would have paid a lesser price had he known of them."

The seller is not liable for apparent defects which might reasonably have come to the notice of the buyer. (Article 1642). However, he shall be liable for latent defects even if he had no reason to know of them unless it has excluded liability for them. (Art. 1643(1)).

It is evident from the foregoing provisions of the Code that in an action on the warranty against latent defect the buyer must aver and prove that there was a defect in the property sold; that such defect was hidden or latent and that such latent defect rendered the property unfit for the purpose for which it was intended. The buyer who invokes the warranty does not need to prove, in order to establish the liability of the seller, the seller's knowledge of the defect, even though the knowledge of the defect by the seller, may in terms of Article 1645 of the Code, render the seller liable to pay damages in addition to his liability to return the price of the property sold. Defects which might reasonably have come to the notice of the buyer are apparent defects. It is thus incumbent on the buyer who invokes the warranty to plead and give evidence of the defect to enable the court to make a finding whether it is

apparent or latent. The mere description of a defect as "latent" by the buyer, in the absence of an admission of that fact by the seller, will not suffice. In this case, the respondent did not even go as far as describing in his plaint the defect he alleged as latent.

The case of L'Esperance v Banane (1971) SLR 247 correctly states the nature of a latent defect and, in effect, what the buyer must prove to justify a conclusion that defect in the property sold was latent. It was held that a hidden defect is one which the purchaser cannot detect on a careful examination of the thing sold, and, more importantly, that if the detection of the defect requires experience and skill the purchaser may not plead his ignorance to have a defect declared to be hidden, but should seek the assistance of competent advisers.

In this case, the allegation made on the plaint was that "the engine of the boat was defective" without any averment that the defect was hidden or patent. Even then, the inadequate averment was denied in paragraph 6 of the defence. The judge was in error in regarding it as undisputed that "the cause of this action is some defects in the engine of the boat." What is nearer the mark is that the cause of the action was an allegation of some defects in the engine. The learned judge having correctly adverted to the definition of latent defect seemed to have adopted an erroneous approach to the matter when he discussed at some length the knowledge of the seller, the appellant, of the defects and neglected to ask the crucial question whether there was evidence at all to satisfy the test of latency, which is whether the defect was one which could not be detected on a reasonable examination. But perhaps the more damning error was the assumption that it was common ground that the engine was defective.

A defect in the ordinary sense of the word is "a fault or lack that spoils a person or thing." (See Oxford Advanced Learner's Dictionary). Latent defect connotes an existing but not yet active, developed or visible defect. Such defect to amount to a breach of warranty must have existed at the time of the purchase though it had not yet become developed or visible defect. The evidence in the present case by the respondent was that he had problem (1) with the silencer of the boat, (2) with the injector, (3) with the starter as water was entering it. These according to him were the three "problems" with the engine. As for the starter it is evident from the respondent's evidence that water got into the engine compartment while the respondent was in charge of the boat. It was the water which had affected the starter. As for the silencer

the burnt silencer was soon replaced at a cost of Rs.150/-. There was no evidence that a burnt silencer indicated a defect in the engine. Rather, the evidence of the respondent was that the silencer was "too thin". That was something a visual examination would easily have revealed. If it was a defect, it could not have been a latent defect. As for the injector, the respondent's witness, Mr. Cedras, said that the engine was "OK" apart from the injector. However his evidence was also that the mechanic consulted to carry out repairs said that there was nothing wrong with the injector. There was evidence of the respondent that when he noticed that there was problem with the boat he got Mr. Basset to check it and that on one occasion he started the engine in the presence of Mr. Basset when smoke came out of the injector system. Mr. Basset who testified for the respondent did not mention the injector as one of the items the respondent complained about. He was asked in cross examination:

"He complained after the first trip, the defects were put right, but he never complained about the engine, he complained about other thing, is that correct?"

He answered :

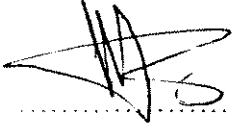
"Yes."

There was obviously not much on record to go by, by way of evidence, to show that the injector was defective or that there was any latent defect in the engine. It therefore cannot be an acceptable conclusion when the judge held that it was established "that the latent defect of the material boat engine was present even before the sale and hand over of the boat to the plaintiff". The learned judge himself became somewhat hesitant in his conclusion when he said: "The latent defects, if at all, then they were present before delivery of the boat to the plaintiff." (emphasis ours). The evidence shows that the complaint about the starter and the silencer cannot rightly be termed defects. The complaint about the injector should have been substantiated by evidence of someone who examined the injector and was able to testify to its condition.

It is clear that the learned Judge on the evidence before him should have found that the respondent had not proved a breach of warranty and should have accordingly dismissed the case. In the circumstances, the appeal is allowed, the judgment of the Supreme Court is set aside, and the plaintiff's

(respondent's) case is dismissed. The defendant (appellant) is entitled to costs of the trial and of the appeal.


Dated at Victoria this 5<sup>th</sup> day of December 1997.



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A. SILUNGWE  
JUSTICE OF APPEAL



.....  
E.O. AYoola  
JUSTICE OF APPEAL



.....  
M. A. ADAM  
JUSTICE OF APPEAL

Handed down

Adam JA