

IN THE NORTH GAUTENG HIGH COURT, PRETORIA
(REPUBLIC OF SOUTH AFRICA)

Date: 2011-06-02

Case Number: 37427/2009

In the matter between:

D & E EARTHWORKS & PLANT HIRE CC	Plaintiff
and	
LEZMIN 3030 CC	Defendant

DEED OF SETTLEMENT IS NOT APPLICABLE

(1) REPORTABLE: YES/NO

(2) OF INTEREST TO OTHER JUDGES: YES/NO

(3) REVISED

DATE: 2-6-11

SIGNATURE: *RR Smit*

JUDGMENT

SOUTHWOOD J

[1] This is an action for damages in which each party claims from the other payment of damages sustained when the plaintiff's excavator which was being conveyed on the defendant's low-bed trailer collided with a bridge over the N1 freeway approximately 12 kilometres north of Bela Bela. Both the excavator and the low-bed trailer were damaged in the collision. The plaintiff claims payment of damages in the sum of R9 879 136,31 and the defendant claims payment of damages in the sum of R540 000.

- [2] At the pre-trial conference the parties agreed to separate the issues of liability and damages and at the hearing an appropriate order was made in terms of Rule 33(4). Accordingly, as agreed, this part of the hearing is concerned only with those issues referred to in paragraph 5.2 of the plaintiff's pre-trial conference agenda (see page 4 of the pre-trial bundle).
- [3] The collision occurred because the boom and dipper stick of the excavator were not completely folded so that the excavator was not able to pass safely under the bridge with which it collided. The margin of error appears to have been extremely small as the two vehicles continued to pass underneath the bridge after the collision and after doing so were brought to a halt about 50 metres from the bridge.
- [4] Each party alleges that the other party negligently caused the collision. The plaintiff alleges that the defendant's driver was negligent in loading or allowing the excavator to be loaded in such a manner that it was too high to pass underneath the bridge and in attempting to drive underneath the bridge without taking reasonable steps to ensure that it could pass under the bridge. The defendant alleges that the plaintiff's operator was negligent in that he loaded the excavator onto the low-bed trailer without properly lowering the dipper stick and boom to ensure safe passage underneath bridges on the freeway and in that he failed to lower the dipper stick and boom of the excavator even after the defendant's representatives told him to do so.

[5] Apart from denying that the driver of the low-bed trailer was negligent the defendant alleges that it is exempted from liability because of two notices prominently displayed in the defendant's workshop and on the defendant's vehicle. The defendant also raises the issue of contributory negligence, and, in addition to the aforementioned grounds of negligence referred to in its counterclaim, alleges that its driver specifically questioned the plaintiff's operator whether the dipper stick and boom of the excavator were not too high to travel on the N1 freeway and that the operator confirmed to the driver that he had loaded the excavator on many occasions, that it was not too high and that it was safe to travel.

[6] The excavator is shown in photographs A to U at pages 1-11 of exhibit B. It is described as a 30 ton excavator and appears to be a very large vehicle which runs on tracks. The operator's cabin and engine are situated directly over the tracks and the boom and dipper stick project outwards from the cab. The boom is closest to the cab and is connected by means of an articulated joint to the dipper stick which is itself connected by an articulated joint to a bucket which digs into the ground and removes material. In operation the boom, dipper stick and bucket work much in the same way as a human arm and hand. The boom and dipper stick bend like an elbow and the bucket bends and turns like a hand. Usually when being conveyed by a low-bed trailer the dipper stick and bucket are folded back towards the cab and the

boom is lowered so that the bucket rests on the floor of the low-bed trailer. On the day in question the plaintiff's operator did not fold the dipper stick back to the cab or lower the boom so that the bucket rested on the floor of the low-bed trailer. Instead he folded the dipper stick partially and then brought the bucket down onto a vehicle tyre which the defendant's employees placed on the low-bed trailer to protect the bucket and low-bed trailer from damage. Why he did this is in contention. The plaintiff's operator, Joseph Kutumela, testified that he wanted to load the vehicle with the boom and dipper stick completely bent and with the boom lowered so that the bucket rested on the floor of the low-bed trailer but the defendant's driver, Dirk Werthmann, told him that this was not necessary and that the boom and dipper stick were low enough. When he and the other man present insisted he, Kutumela, thought it would be safe to go out onto the highway.

17 It is common cause or cannot be disputed that –

(1) on or about 7 May 2008 the plaintiff represented by its sole member, D. Kotze, and the defendant represented by its sole member, H. van Schalkwyk, entered into an oral agreement in terms of which –

(a) the plaintiff leased the excavator and operator to the defendant; and

(b) the plaintiff would deliver the excavator to the defendant at the defendant's premises at Bela Bela where it would be loaded onto the defendant's low-bed trailer to be conveyed to a construction site at Polokwane where the defendant was executing civil engineering works;

(2) on 12 May 2008 the plaintiff delivered the excavator to the defendant at the defendant's premises at Bela Bela where it was first offloaded from the low-bed trailer which brought it there and then loaded onto the defendant's low-bed trailer which was to convey the machine to Polokwane;

(3) when the excavator arrived at the defendant's premises at Polokwane Mr. Kotze was there to talk to the operator and inspect the machine;

(4) Mr. Kotze entered the office where the disclaimer sign was displayed but his attention was not pertinently drawn to the notice and no attempt was made to incorporate the disclaimer into the lease agreement;

(5) Mr. Kotze left the defendant's premises before the operator and the driver of the defendant's low-bed trailer commenced the loading of the excavator;

- (6) the plaintiff's operator, Joseph Kutumela, loaded the excavator onto the defendant's low-bed trailer with the assistance and under the instructions of Dirk Werthmann;
- (7) Joseph Kutumela did not park the excavator in the standard position with the dipper stick fully folded and the boom lowered so that the bucket pressed against the floor of the low-bed trailer. He parked it with the boom and dipper stick partially folded so that the dipper stick pointed more or less vertically downwards and the bucket was pressed against a motor vehicle **tyre**;
- (8) after the excavator was loaded Mr. Werthmann drove the defendant's low-bed trailer with the excavator onto the N1 freeway to Polokwane with Joseph Kutumela sitting in the passenger seat;
- (9) about 12 kilometres north of Bela Bela the defendant's low-bed trailer reached an overhead bridge with which the excavator collided;
- (10) Mr. Werthmann drove the defendant's low-bed trailer at a speed of between 65 and 70 km/h and at no stage reduced speed before the excavator collided with the bridge.

- [8] The parties called four witnesses. The plaintiff called its sole member Mr. Dirk Kotze and the operator of the excavator, Mr. Joseph Kutumela. The defendant called its sole member, Mr. Heinrich van Schalkwyk, and the driver of the defendant's low-bed trailer, Mr. Dirk Werthmann. None of the witnesses impressed as having a clear recollection of the events and in the case of Mr. Werthmann he appears to have fabricated the evidence he gave in court. It differs in material respects from the version put to Mr. Kutumela and smacks of an attempt to escape any liability for the damage caused in the collision. The defendant did not call its workshop manager, Mr. Marx, who according to Kutumela witnessed the loading of the excavator onto the defendant's low-bed trailer. Mr. Marx was present at court and his version was put to Mr. Kutumela. Since Mr. Marx was present when the excavator was loaded onto the defendant's low-bed trailer and witnessed what took place the inference is justified that the defendant knows that he cannot refute what Mr. Kutumela said.
- [9] Mr. Kotze and Mr. Van Schalkwyk testified about the terms of the contract which for present purposes are not contentious. Mr. Van Schalkwyk also testified about the necessity for carefully loading a heavy piece of equipment (such as the excavator) onto a low-bed trailer. It must be positioned so that it does not disturb the balance of the vehicle and cause it to overturn easily. It was clear from Mr. Van Schalkwyk's evidence that he did not rely on the disclaimer pleaded by

the defendant, that he accepted that the plaintiff had delivered the excavator to the defendant on 12 May 2008 and that once the excavator had been loaded onto the defendant's low-bed trailer and the journey commenced the defendant was in control of the excavator.

- [10] It must be accepted that Mr. Kutumela loaded the excavator onto the defendant's low-bed trailer with the assistance and under the instructions of the defendant's employees. Mr. Kutumela did not park the excavator in the standard position which he had been trained to do. His explanation was that he parked it on the low-bed trailer as he was instructed to do by the defendant's employees, clearly Messrs. Marx and Werthmann. Although this was disputed in cross-examination and the contrary versions of Messrs. Marx and Werthmann were put to Mr. Kutumela Mr. Marx did not testify and Mr. Werthmann did not support the version put and testified that he was not present when the excavator was loaded. Mr. Kutumela clearly knows what the correct park position for the excavator is and his evidence provides the only rational explanation for not parking the machine in that way. His evidence is supported by Mr. Van Schalkwyk's evidence that the operator of an excavator would not be able to position the vehicle properly on the low-bed trailer unless he was shown where to park by the defendant's employees and it is probable that they told him to lower the boom so that the bucket rested on a tyre. There is no other explanation for the presence of the tyre. It is not in dispute that a tyre was placed beneath the bucket and this was clearly done to prevent

damage to the bucket and trailer. It is therefore found that the excavator was parked on the low-bed trailer in accordance with the defendant's employees' instructions.

[11] Once the defendant's low-bed trailer left the defendant's premises for the journey to Polokwane the defendant's employee, Mr. Werthmann, was in control of the trailer and excavator. Mr. Werthmann knew that the trailer and excavator would have to pass under a number of overhead bridges on the way to Polokwane and he obviously should have made sure that they could do so safely. Mr. Werthmann did not take any steps to determine the height of the excavator boom himself. If he asked Mr. Kutumela whether it was safe that clearly was not sufficient. At no time thereafter did Mr. Werthmann attempt to ensure that the trailer and excavator would be able to pass safely under the bridges over the highway. There is no evidence that he even slowed down when approaching the bridge with which the excavator collided. He said he travelled at about 65-70 km/h and apparently he was still doing so when he felt the jolt of the collision. Even if Mr. Werthmann's evidence that he asked Mr. Kutumela whether the truck could go under the bridge and received the reply that it would fit, they always load the trailer like that, can be believed this would not assist the defendant. If Mr. Werthmann was concerned about the possibility of a collision he proceeded without taking any reasonable steps to ensure that the trailer and excavator would pass safely under the bridge – see **Kruger v Coetzee 1966 (2) SA 428 (A)** at 430E-H. According to Mr.

Werthmann he had already asked Mr. Kutumela whether everything was alright and had received an affirmative assurance. Yet when he approached the bridge he was still apprehensive. A reasonable man in his position would have brought his vehicle to a halt close to the bridge and made sure that the boom was low enough to pass under it.

[12] Understandably, in the light of these facts, the defendant's counsel conceded that Mr. Werthmann had been negligent. Nevertheless, he contended that Mr. Kutumela's negligence also caused the collision and that the court should order an apportionment. He argued that by parking the excavator on the defendant's low-bed trailer with the boom still partially elevated Mr. Kutumela was negligent. I do not agree. In the circumstances where he parked the excavator under the instructions of the defendant's employees Mr. Kutumela would not foresee the reasonable possibility of this causing patrimonial loss. See **Kruger v Coetzee supra**. A reasonable man would accept that the defendant's employees and especially the driver would not load the excavator in such a way that it would collide with a bridge. A reasonable man would also not foresee that the driver would persist in attempting to drive under a bridge when it was possibly not safe to do so. Even if Mr. Kutumela was negligent Mr. Werthmann's negligence must be regarded as 'the cause' of the collision. He failed to ensure that the excavator was loaded so that it would pass safely under the bridges and when he approached the bridge he made no attempt to ensure that it would pass safely under the bridge. It is therefore found

that Mr. Kutumela was not negligent and that if he was such negligence did not cause the collision.

[13] The defendant's counsel frankly conceded that the disclaimer pleaded was not supported by the evidence and he did not attempt to persuade the court that it was a good defence. In my view this concession was correctly made.

[14] Although Mr. Kutumela's evidence is not satisfactory in every respect (e.g. there is no explanation for the two white men's aggression towards him and his evidence about his fears of a collision is contradictory) he provides a rational explanation for the manner in which he parked the excavator on the low-bed trailer. He did not deviate from his version that the two white men instructed him how to park the machine. This evidence is not refuted by the defendant's evidence. Mr. Marx who is obviously one of the white men was not called to give evidence which in the circumstances warrants an adverse inference – see *Webranchek v LK Jacobs & Co Ltd* 1948 (4) SA 671 (A) at 682 and *Munster Estates (Pty) Ltd v Killarney Hills (Pty) Ltd* 1979 (1) SA 621 (A) at 624B-H. Mr. Werthmann who was called testified to a version completely different to that put to Mr. Kutumela and in some detail to a version not put at all. Contrary to what was put to Mr. Kutumela Werthmann testified that he was not present when the excavator was loaded. He then testified in some detail about what happened between him and Mr. Kutumela after they

left the defendant's premises which was not put at all. This is contrary to the basic rules set out in *President of the Republic of South Africa & Others v South African Rugby Football Union & Others* 2000 (1) SA 1 (CC) paras 61-64 and *S v Boesak* 2000 (1) SACR 633 (SCA) paras 51-52 and in the circumstances justifies a finding that the evidence is a fabrication and therefore must be rejected. It is significant that Mr. Van Schalkwyk testified that his employees (obviously Messrs. Marx and Werthmann) told him that the plaintiff's operator loaded the excavator on the instructions of the plaintiff (see A10 para 1) something which was completely untrue. It is also significant that neither of the defendant's witnesses testified in support of what the defendant alleged had taken place when the excavator was loaded (see plea paras 9.5.2 and 9.5.3 and counterclaim para 12.2). On the face of it the allegation that the plaintiff's operator was negligent in not lowering the boom and dipper stick even after being told by the defendant's representatives to do so is so inherently improbable that it cannot be believed. It implies that both parties set off on their journey to Polokwane knowing that the boom and dipper stick constituted a danger and did nothing about this. In the light of these facts and circumstances I agree with the plaintiff's counsel that the defence raised was dishonest.

13 The following order is made:

- I It is declared that the defendant's negligence was the sole cause of the collision between the plaintiff's excavator and the bridge on 12 May 2008 and that the defendant is liable for all of the damages which the plaintiff can prove were caused by that collision.
- II The defendant is ordered to pay the costs of this hearing including the costs of a senior counsel wherever a senior counsel was employed.


B.R. SOUTHWOOD
JUDGE OF THE HIGH COURT

CASE NO: 37427/2009

HEARD ON: 31 May 2011 and 1 June 2011

FOR THE PLAINTIFF: ADV. B. BERRIDGE SC

INSTRUCTED BY: Everingham, Rogers, Nel & Partners

FOR THE DEFENDANT: ADV. D. PRINSLOO

INSTRUCTED BY: Bornman & Mostert Attorneys

DATE OF JUDGMENT: 2 June 2011