IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE LOCAL DIVISION – PORT ELIZABETH

Case No.: 601/2017

In the matter between:

NORDICBAU MASTER BUILDER & RENOVATOR CC Plaintiff

and

STAPELBERG VERVOER

t/a MILLTRANS Defendant

JUDGMENT

REVELAS J:

1. This matter concerns the question whether the plaintiff is entitled to claim contractual damages for its loss of earnings suffered as a

result of damage to its two maniscooic machines ('tele-handlers') sustained in transit when transported by the defendant, a carrier for reward.

2. The plaintiff, who conducts business, *inter alia*, in the rental of support equipment to the film industry, instituted an action for consequential damages against the defendant, a transport contractor, who was to transport the plaintiff's two tele-handlers from Port Elizabeth to Cape Town on 15 November 2015. During their transportation both tele-handlers were damaged. The total amount of damages claimed is R 2 120 426.00.

3. At the behest of the defendant the issues relating to quantum and liability were separated and the trial proceeded on the question of liability only. The plaintiff called one witness, Mr Louis Le Roux, its financial manager and the defendant, who placed several issues in dispute, called no witnesses.

4. The plaintiff pleaded that it was the owner of two Manitou MRT2150 tele-handlers with serial 175 821 820978 and 750984 respectively, purchased from Moyersoen NV/SA and Johann Bruggs who were based in Belgium. The telehandles were shipped from the harbour of Zeebrugge in Belgium to Port Elizabeth by

World Freight aboard the vessel Tiger. The defendant undertook to transport the tele-handlers from Port Elizabeth harbour to Cape Town.

5. The plaintiff pleaded further that it was a term of their agreement that the defendant would carry out the transporting of the tele-handlers in such a way as to prevent them from being damaged and to deliver them to the plaintiff in Cape Town in the same good and/or undamaged condition as it was when the defendant took delivery thereof.

6. According to the plaintiff's particulars of claim the tele-handlers arrived in Port Elizabeth in good and operationally fit condition, so that they were capable of being utilised in the plaintiff's business earning R15 720.00 per day in rental fees.

7. Unfortunately, the two tele-handlers were damaged, allegedly as a result of the defendant or its employees while acting in the scope and course of their agreement. The one tele-handler ('the first tele-handler') fell from the ramp by which it was moved onto the load bed of the defendant's vehicle while being loaded. The other ('the second tele-handler') was damaged when the defendant's vehicle, on which it was being transported left the road, due to

the alleged negligent driving of the driver of the vehicle and the tele-handler fell from the vehicle.

8. The plaintiff pleaded that the agreement was concluded upon the parties' mutual understanding that the plaintiff intends to use the two tele-handlers for purposes of generating an income and should the tele-handlers be damaged in the execution of the transport agreement or if delivery be delayed due to a breach of that agreement, the plaintiff would suffer damages due to a loss of income. The defendant failed to respond to this assertion by the plaintiff and it stand uncontested on the pleadings.

9. The plaintiff further pleaded that the reasonable period for the repairs to the first tele-handler was 144 days and for the second one 137 days that the first tele-handler was damaged beyond repair. The amount of the damages claimed by the plaintiff consisted of two claims. In respect of the first tele-handler the plaintiff pleaded that it usually rented a tele-handler for 15 days per month (half of the 144 days, i.e. 72 days) at R15 720.00 per day, amounting to R1 131 840.00. From that the cost of an operator paid R680.00 per day had to be deducted. Thus R45 216.00 over 72 days was subtracted from the aforesaid total sum, amounting to R1 086 624.00.

10. The second claim was for the damages suffered in respect of the second tele-handler and was for the amount of R1 033 802.00, calculated by using the same formula used in the first claim but based on half of the period for repairs which plaintiff alleged was 137 days.

11. It was common cause that when the transport agreement was concluded on 23 October 2015, the defendant was represented by one Otto Krause and the plaintiff by an agent, Corinna Wild of Wild C's, a transport consultant. The written agreement (one page long in the form of an acceptance of a quote for transportation) reflected that the two tele-handlers, described as Maniscopic MRT2150 Machines, (weight 16,180 kilograms) would be transported by the defendant with two vehicles at the cost of R15 200.00 each. The place of departure (Port Elizabeth Harbour) and destination (Liftup Teleporter and Crane Hire - Culemborg Container Depot, Christiaan Barnard Road, Cape Town) were also reflected. Since the document contained all the aforesaid information, it met the requirements of a proper contract for carriage by land for reward.[1] The contact person for the plaintiff

---

[1] Wille, *Principles of South African Law,* Ninth Edition at 971

was given as Ulrich Plotz. He is the main member of the plaintiff. The carriage contract also contained a term that the " *[q]uotation includes R1,0 million 'goods in transit insurance' of full capacity of the vehicle"* The copy of the aforesaid contract was attached to the defendant's plea.

12. The defendant pleaded that Corinna Wild of Wild C, as agent *"purporting to act on the behalf of her principal to wit Liftup Teleport and Crane Hire, alternatively Ulrich Plotz, and so authorized, alternatively ostensibly authorised, accepted a quotation provided by the Defendant to transport goods for the amount of R15 200 per vehicle"* and for a maximum insurance cover of R1 000 000.00 per vehicle, for goods in transit, and that the balance of the risk would be borne by Wild C's principal or client.

13. According to Mr Le Roux the client was at all times the plaintiff. It is clear from the contract itself that Liftup transport was merely the receiver at the destination given in the carriage contract.

14. The defendant further pleaded its persistence that the tele-handlers were not the plaintiff's property and that it was not a party to the agreement. However, it also pleaded that *"(t)he Defendant was provided with claims documentations and reported the insurable risk event to its insurers who then transferred the proceeds of*

the claim into the Defendant's bank account for forward payment into attorney Welgemoed's account."

15. Welgemoed attorneys have at all relevant time been the attorneys of record of the plaintiff.

16. It is common cause that the defendant paid the plaintiff the amounts of R970 000.00 and R744 692.67 respectively on 15 February 2016 and during April 2016. The defendant was the insured or beneficiary in terms of an insurance policy concluded with Santam Insurance for a maximum amount of R1 000 000,00 per tele-handler and it was in terms of this goods in transit ('GIT") policy that the defendant was paid out the aforementioned amounts arising from the damage to the tele-handlers. The aforesaid Santam GIT policy specifically excludes cover for consequential damages. Under the heading "EXCEPTIONS TO SUBSECTION A" it provides:

"The company shall not be liable to pay for:

(a) consequential financial loss as a result of any cause whatsoever...."

17. The defendant pleaded that the plaintiff was not entitled to claim beyond the aforesaid maximum amount. In this regard the defendant relied on a letter from Mr Plotz to Ms Wild prior to the

conclusion of the carriage contract wherein he asked her to arrange cover for the tele-handlers up to a maximum R1 000 000.00 and added that he would cover any loss beyond that himself.

18. The defendant pleaded further that no claim was made for additional damages (i.e. for loss of income) and that the aforesaid payments referred to above were paid to the plaintiff in full and final settlement of all claims *"and accordingly neither the plaintiff or any other party purporting to bear the risk will be prevented from claiming such damages as a result of the ne bis in idem rule".* However, it is clear from the correspondence between the parties on 4 December 2015 that there was no such agreement. Before the payments were made the following year, the plaintiff indicated in clear terms to the defendant that it would not accept the payment in full and final settlement of all its claims and in particular its claim for loss of income. This was conveyed to the defendant's attorneys in an e-mail dated 4 December 2015. On the same day the defendant responded through its attorneys that the plaintiff is not entitled to claim for loss of income and raised the defence of *"force major"* and referred to the fact that the plaintiff did not *"ask for R2 million insurance"* per tele-handler On 14 December 2015 the plaintiff through its attorney warned the

defendant that *"the longer it takes to resolve the matter, the larger our client's claim will be for loss of income."*

19. In paragraph 7 of the pre-trial minute signed by the respective attorneys of the parties, the following issues were listed as issues to be decided by the court:

"a. That the Plaintiff has the necessary locus standi to issue summons and what the plaintiff's status is. The defendant has denied the name and the status of the plaintiff being a close corporation;

b. that the plaintiff trades in the rental of support equipment to the film industry, such equipment to include telehandler machines;

c. that the plaintiff was the owner of two Manitou MRT2150 telehandlers with serial numbers 175821820978 and 750984;

d. that the plaintiff bore the risk in respect of the said telehandlers;

e. the allegations in respect of the agreement between the plaintiff and the defendant as set out in paragraph 9, 9.1 – 9.8 of the plaintiff's particulars of claim;

f. that the telehandlers were in a good and operational condition;

g. that the telehandlers could be utilized by the plaintiff in his business by renting same out at a rental of R13,445.00 per day and that the telehandlers were delivered to the defendant to be transported from Port Elizabeth to Cape Town;

h. *that the defendant paid out costs to repair the telehandler which was damaged on the 7th of April 2016;*

i. *that the plaintiff has suffered damages and what the amount of damages were in respect of the telehandlers which were respectively repaired and or replaced and which could not be utilized during certain periods;*

j. *that the one telehandler was transported and damaged when it fell off the defendant's vehicle during transportation thereof and the other telehandler was damaged during the process of loading same onto the defendant's vehicle and that these incidents were caused by the negligence of the defendant and or his employees;*

k. *that the aforesaid telehandlers could not be used and that the plaintiff was deprived of the use thereof for certain periods before a replacement telehandler could be delivered the plaintiff and that the plaintiff suffered loss of income for that period and what the extent of the damages so suffered were;*

l. *that the damages suffered by the plaintiff were in accordance with the expert's report as set out in the Notice in terms of Rule 36(9)(b);*

m. *whether the plaintiff is prevented for claiming damages as a result of the ne bis idem rule;*

n. *whether the insurance cover of R1,000,000 per vehicle/telehandlers for goods in transit excludes the plaintiff from issuing claims in respect of loss of income."*

20. Despite the aforesaid list, many of which items pertain to the quantum of damages, the main issue left for determination in this trial is whether the plaintiff is entitled to additional damages, i.e. consequential damages over and above those of the replacement costs and repairs to the two tele-handlers and beyond the amount of R1 000 000.00, which the defendant set as the maximum amount that could be claimed by the plaintiff.

21. Mr Pieter Le Roux, the plaintiff's financial manager explained, with reference to several documents, such as the purchase contracts, applications for foreign currency and tax clearance were contained in the plaintiff's trial bundle, that the plaintiff had indeed purchased the two tele-handlers from the entities or persons referred to in the particulars of claim and established that it was the owner. Mr Plotz, the main member of the plaintiff, a close corporation, had negotiated the terms of the agreement with Corinna Wild. Mr Le Roux also explained that it was cheaper to buy the tele-handlers on auction overseas rather than purchase them locally.

22. The defendant disputed that the plaintiff was the owner of the tele-handlers and thus had no *locus standi* to bring the present

action. As stated, Mr Le Roux provided all the necessary documentation to prove the ownership. Mr Plotz of the plaintiff negotiated the terms of the contract with Ms Wild who was the plaintiff's agent. Mr Le Roux had ample knowledge of the financial affairs of the plaintiff, sufficient to give evidence in this regard and his testimony was supported by the evidence such as correspondence between Mr Plotz and Ms Wild pertaining to the agreement with the defendant. According to Mr Le Roux he processed all documents including the terms and conditions of the contract. The plaintiff accordingly had the necessary *locus standi* to institute the present proceedings.

Legal Principles

23. If the owner of the goods can prove that the carrier was negligent in exposing the goods to risk, the carrier will not escape liability. The standard of care demanded from a carrier depends on whether the carriage was gratuitous of for read. In the latter case the carrier is liable for ordinary negligence. The onus is on the carrier to prove the absence of fault.[2]

---

[2] *Wille* at 974-5 and the cases cited by the authors

24. The Court held as follows in *Hall-Thermotank Africa Ltd v Prinsloo*[3]*:*

"Once the carriage is for reward, there is an absolute liability on the part of the carrier to ensure that the goods which he receives are delivered undamaged. If they are delivered in a damaged condition, he must compensate therefor, as an absolute liability, unless he can show (and the onus in this regard is on him) that the damage occurred through damnum fatale or vis major, in other words, that there was a superior force over which he had no control, which cause the loss, or the loss inevitable and unavoidable from the point of view of a reasonable man."

25. A defaulting party's liability is limited to *(a)* those damages that flow naturally and generally from the kind of breach of contract in question and which the law presumes the parties contemplated as a probable result of the breach, and (b) those damages that, although caused by the breach of contract are ordinarily in law regarded as too remote to be recoverable unless in the special circumstances attending the conclusion of the contract, the parties actually or presumptively contemplated that they would probably result from the breach.[4]

---

[3] 1979 940 SA 91 (T) at 93 H

[4] *Shatz Investments (Pty) Ltd v Kalovyrnas* 1976 (2) SA 545 (AD) at 550 followed in *Holmedene Brickworks (Pty) Ltd v Roberts Construction Co Ltd 1977 (3) SA 670 (A)*

26. In the present matter the defendant is not in a position to dispute that it was a carrier for goods for reward by land and that through its negligence or the negligence of its employees the two tele-handlers were substantially damaged. The fact that both tele-handlers were damaged when carried by different vehicles and both fell off the load beds onto which they were loaded, strongly suggests that neither were properly affixed to the vehicles that had to transport them to their destination. Clearly the defendant had breached the carriage contract. As a result of the aforesaid breach of contract the tele-handlers could not be used for the purpose for which they were purchased and it follows logically, that the plaintiff was deprived of income during the time they were either repaired or replaced, whichever the case may be. Mr Le Roux confirmed that at the time the tele-handlers were in demand in the film industry and rented out by the plaintiff to earn income. This type of loss must have been contemplated and reasonably foreseen when the carriage contract was concluded by the parties.

27. In *Shatz,* the respondent successfully sued the appellant for loss of profit (or income) and goodwill raising from the appellant's breach of a lease agreement. The respondent conducted a bakery business on premises leased from the appellant who undertook in the lease agreement between the parties, not to lease premises

in the same building to any other purveyor of food stuffs. In breach of the lease, the appellant concluded a lease agreement with another tenant who indeed sold food stuffs. The Court found that the respondent had suffered a loss of profits and goodwill as a result of the appellants's breach of the lease and that loss was not too remote to have been contemplated by the parties when the lease agreement was concluded between them. In my view, if similar reasoning is applied to the present case, it cannot be said that the plaintiff's loss of income was too remote to have been contemplated by the parties when they concluded the agreement. The defendant did not plead remoteness in any event. It also did not present evidence to the effect that there was no causal connection between the defendant's negligence and the plaintiff's loss of income or revenue, whereas the plaintiff did.

28. The fact that the defendant was only insured for damages arising from damage to the tele-handlers to a maximum of R1million and that it was noted in the agreement, does not preclude the plaintiff from claiming for a loss of income arising from the defendant's breach of the carriage contract. The insurance contract was between the defendant and Santam and does not affect the plaintiff's claim against the defendant, irrespective of what Mr Plotz had instructed Ms Wild regarding cover. It is also significant

that there is a substantial difference of almost R250 000,00 between a R million and the actual amount paid to the plaintiff in respect of one of the telehandlers. The defendant and /or its insurer intended only to compensate for repairs and replacement costs and no other damages. If there was such a limitation to the defendant's liability, there ought to have been a clause in the agreement that effect. The carriage contract does not contain any such an exclusion or limitation clause.

29. According to Mr Le Roux, the first tele-handler that had to be replaced was purchased for Euro105 000,00 (before shipping, clearance and transport costs), which is in excess of R1million, which excess was absorbed by the plaintiff in accordance with the GIT policy. This policy, according to Mr Le Roux, only provides cover in respect of actual damage to the goods transported, and not consequential damages. This evidence was not controverted by any evidence from the defendant and as referred to above, the policy specifically excluded such damages. It follows that the defendant is precluded from relying on its agreement with its own insurer to escape liability from damages caused by it to the plaintiff where such damages are not covered by the insurance policy in question.

30. In the circumstances and for the reasons set out above, it is concluded that the plaintiff has succeeded in proving that the defendant is liable for the plaintiff's consequential damages, in the form of a loss of income, sustained as a result of the defendant's breach of the carriage contract concluded between the parties.

31. In the circumstances the following order issue:

1. It is declared that the defendant is liable to the plaintiff for consequential losses suffered by it arising from the two machines on 15 November 2015, when the plaintiff's tele-handlers were damaged, whilst being transported from Port Elizabeth to Cape Town.
2. The quantification of the Plaintiff's damages stand over.
3. The defendant is to pay the Plaintiff's cost of suit.

E REVELAS

Judge of the High Court

Appearances:

For the Plaintiff: Adv A De Villiers instructed by Welgemoed Attorneys c/o Lawrence Masiza Vorster Inc., 214 Cape Road, Mill Park, Port Elizabeth

For the Defendant: Adv P Jooste instructed by Greyvensteins, St George's House, 104 Park Drive, Port Elizabeth

Date heard: 29 and 30 October 2020

Date delivered: 13 July 2021