

IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Case No.: 3302/2011

In the matter between:-

JANKA VERVOER CC

Plaintiff

and

HALLMARK MOTOR GROUP (PTY) LTD
t/a NEW VAAL MOTOR GROUP

Defendant

HEARD ON: 19 MARCH 2013 – 4 DECEMBER 2013

DELIVERED ON: 20 FEBRUARY 2014

JUDGMENT

MOCUMIE, J

- [1] The plaintiff, Janka Transport, issued action against the defendant, New Vaal, for payment of the sums of R233 250.40 (two hundred and thirty three and two hundred and fifty rand forty cents), being the reasonable and fair costs of repair to a Mercedes Benz motor vehicle with registration number DMF 819 FS (“the truck”) after its propshaft collapsed consequent upon repairs being done on the truck by the defendant in Bethlehem, R6 500.00 (six thousand and five hundred rand), being the costs of cleaning up of the road where the propshaft broke, and R9 120.00 (nine thousand and one hundred and twenty rand), being the towing charges paid by the plaintiff delivering the truck to Ladybrand.
- [2] The plaintiff is a close corporation registered in terms of the South African laws with its head office at Bleakvlei, Clocolan; Eastern Free State Province. It serves as a truck contractor and transporter of bulk farming products across the country to different clients. Its sole member is Mr Johannes Hendrik Botha (“Mr Botha”). The truck in issue belonged to Masupa Trust (“the Trust”) of which Mr Botha was the sole Trustee. The defendant is a company registered

in terms of the South African laws with its head office in Duncanville, Vereeniging, Gauteng Province. The defendant is Hallmark Motor Company t/a as New Vaal Motor Group. It is one of John William's agents in the Free State and deals as well as repairs trucks and does their general maintenance.

- [3] The following was common cause between the parties. Janka Transport bought a new Mercedes Benz truck from John Williams, Bloemfontein during November 2008. On 15 December 2010 the truck in issue broke down along N3 Harrismith highway. The truck was towed to New Vaal Bethlehem, where it was repaired for "overfuel in one of the pistons, piston no 6 and a sleeve."¹ The truck was returned to the plaintiff on 21 December 2010.

- [4] On 28 January 2011 on the same route, the same truck broke down again. The truck was towed to Mercedes Benz Ladybrand instead of Bethlehem for repairs on instructions of Mr Botha. In order to tow the truck properly and as is practice in the industry, the truck's driveshaft commonly known as a propshaft ("propshaft") was removed by the towing services with the knowledge that it will be refitted after the repairs were effected. The propshaft was indeed refitted after repairs.

- [5] It was further common cause between the parties that initially John Williams Technical Division in Ladybrand was of the view that the breakdown as Mr Willem Christoffel Coetzee² put it: "[was] die voorste kruiskoppeling [ge]wees omdat dit al vantevore gebeur het..."³ That Mr Coetzee disagreed with this prognosis and instead sent the parts of the truck in issue for further investigations to Mr Von Wielligh, a metallurgical engineer, Mercedes Benz's appointed expert. The latter's findings were that the damage was caused by poor workmanship on the part of the defendant's employees. The defendant disagreed and subsequently launched its own investigation. Mr Leyster, the defendant's expert was of the view that the defendant was not at fault. The two experts had a joint conference but could not reach any consensus. They drew

¹ See evidence of J H Botha at page 221 - 250 of the transcribed record.

² The manager at John Williams Sales Division

³ See page 118-220 of the transcribed record.

up separate reports which conflicted on the cause of the damage. Thus this trial.

- [6] The issues in dispute between the parties were whether the propshaft was fitted in a professional and workmanlike manner by the defendant at its premises in Bethlehem before the plaintiff took it after it had been repaired during December 2012. Secondly, whether the propshaft fell off at the rear axle as the plaintiff alleged or the front axle as the defendant alleged. Thirdly, whether the defendant was responsible in any manner for the damages caused to the truck when the propshaft broke.

- [7] At the commencement of the trial the parties agreed that the quantum and merits be separated. The agreement was made an order of this Court in terms of Rule 33(4) of the Uniform Court Rules.

- [8] In order for the plaintiff to prove its case on a balance of probabilities it called four witnesses. Mr Adam Jacobus Von Wielligh, an expert and the mechanical engineer who conducted the investigations on the propshaft and smaller particles of the gear box; Mr Willem Christoffel Coetzee, the manager at John Williams Motors, Bloemfontein and Ladybrand; Mr Johannes Hendrik Botha, the plaintiff's sole member; and Mr Jacob Likotsi, the assistant to the driver and the person who was in the truck before it broke down. The plaintiff opted to call him instead of the driver of the truck in issue known only as Johannes, who was at the time of the trial ill disposed. The defendant led evidence of three witnesses to rebut the plaintiff's case. Mr Anthony Lyster, an expert and insurance assessor; Mr Petrus Johannes Lubbe, the mechanic who worked on the truck; Mr Gary Alexander Brown from Mercedes Benz South Africa; and Mr Marc McKernan , a representative of the defendant.

- [9] On 20 March 2013 an inspection *in loco* was conducted at John Williams' workshop, in Church Street, Bloemfontein. The purpose of the inspection *in loco* was to look at a truck similar to the truck in issue that was standing on John Williams' premises to see the exact parts referred to during the evidence.

A new truck was used to show the different parts and these although new, were exactly as the damaged ones.

The notes recorded at the premises were poorly recorded and of not much assistance to the court. Thus the inaudible notes were dispensed of. More so because the damaged parts of the truck in issue were transported to the court room for closer scrutiny as and when the need arose.

The big/long part of the propshaft was admitted as exhibit 1 and the small/short part of the propshaft as exhibit 2. From time to time and for the better part of the trial much reliance was placed by all parties on the photo album which contained photos of the damaged parts which photos were not in dispute. The photo album and the photos were admitted as Bundle 1 and 2 of the pleadings.

[10] **Mr Jacob Likotsi** testified that he was the assistant to Johannes, the driver on the day in question. He has been Johannes' assistant since 2008 when the truck was bought. When it broke down the two of them were inside the truck. When they were about 5 to 7 kilometres from Harrismith the truck started to shake or vibrate, the driver slowed down in order to drive off the main road. Before he could do so, they heard a big "bang" sound from underneath the truck. The truck came to a stop right in the middle of the tarmac.

[11] He alighted, took out a triangle⁴ and put it behind the truck as is prescribed by the law. As he was outside putting the triangle in place he noticed the long part of the propshaft of the truck some 10 metres behind the trailer.⁵ They also found a small part of the propshaft directly underneath the truck. There were also small parts of the propshaft on the road which he and the driver removed and put alongside the truck. They called the owner Mr Botha. The traffic officers arrived on the scene. The towing service arrived and towed the truck to Bethlehem.

⁴ A triangle is used to warn other road users of a stationary vehicle.

⁵ The truck was pulling a horse and trailer on the day in question.

- [12] He conceded during cross examination that frequently Janka Transport's mechanics checked on the truck when it was on the premises. Meaning as Mr Botha would later confirm that the mechanics worked on it by only cleaning the radiator and the filters. Nothing major. All major services were performed by Mercedes Benz agents. In this instance New Vaal, Bethlehem. He could not tell what could have happened when he was on his annual leave which he said he did not get as often.
- [13] **Mr Johannes Hendrik Botha** testified that he is the sole director of Janka Vervoer. The truck in issue was bought from Mercedes Benz in 2008 brand new and it had a warranty from Mercedes Benz up to 450, 000 kilometres. The truck belonged to the Trust, which is a loan/lease/rental Trust. The Trust leased out the trucks to Janka Vervoer. Janka Vervoer maintained the trucks. Maintenance included paying the salaries of the drivers; buying diesel and repairing the truck(s) as and when necessary.
- [14] He testified that once he was informed about the breakdown of the truck in January 2011 he gave instructions that although New Vaal, in Bethlehem, was closest to where the truck broke down the truck should be towed to Mercedes Benz Ladybrand because during December when the truck broke down the first time New Vaal took unnecessarily long to repair it the last time. Such delay set him back financially during as December is the busiest period of the year of his dealership.
- [15] He testified that after the truck was repaired at New Vaal the first time in December 2010, it was never repaired by any of his employees at Janka Vervoer except when they cleaned the radiator and filters. The truck had travelled more than 9000km at that time and was still under the 45000km warranty. He referred to a spread sheet that his administrative staff in the office had to fill whenever any truck including the one in issue was out on a trip. The spread sheet was meant to monitor the movement of the particular truck. The drivers themselves carried with them a log book in which they noted where they went to; the stops they made including the garages where they refilled fuel. The log book also reflected the kilometres and the name of the garage where the drivers re-fuelled. This of necessity included the detours

on the national roads where they making delivery as well as the time they spent on such detours or what are commonly referred to as “Stop/Go” areas. The relevant period in the log book of this truck was 29 November 2010 until 10 April 2011. The log book was admitted as exhibit “G” and the spread sheet as exhibit “H”.

[16] Cross examination revealed that, as he was not the author of exhibits “G” and “H”; there were times when he or at least his office did not know where the truck in issue was or was parked per the recordings or why the times it travelled or the kilometres it travelled were not recorded in some instances. Nor could he vouch on the extent of the service done, by Janka Transport mechanics on site after New Vaal had returned it .i. e during the period 21 December 2010 and 23 January 2013 when it broke down for the second time. He could also not shed light on why the kilometres on the odometer as recoded by the tow services was different to that which was recorded by Mercedes Benz.

[17] **Mr Willem Christoffel Coetzee** testified that he was the General Manager of the After Sales Division at John Williams Bloemfontein based mainly at Langenhoven Park. He also managed two other branches in Welkom and Ladybrand. He qualified as diesel mechanic and thereafter a motor mechanic. He has worked for John Williams since January 1979; qualified as a diesel mechanic in 1982, which means he has been working for John Williams for 34 years and has been a diesel mechanic for 31 years.

[18] When this incident occurred Mercedes Benz Technical Division was at that stage of the view

“dit [was] die voorste kruiskoppeling [ge]wees omdat dit al vantevore gebeur het...”

He disagreed with the prognosis based on his own experience as a mechanic and manager in the industry as well as his own observation albeit not of an

expert⁶.As a result he sent the gearbox including the parts of the propshaft of the truck in issue to Mr Von Wielligh who was known to him for the past 10 years as an expert in the field.

[19] During cross examination he denied that the damage could have come from the front axle, and maintained that it was from the rear axle.

[20] **Mr Adam Jacobus Von Wielligh** (“Mr Von Wielligh”) is a qualified mechanical engineer. Prior to 2005 he worked for the railway services for a number of years. In 2005 he became a lecturer at the University of Pretoria, Department of Mechanical Engineering. He was a lecturer and then senior lecturer at the university and lectured on post graduate level on courses on vehicle propulsion including engines, transmissions, drive/prop shafts and the design of such components for the third and final year engineering student. He had a company with construction machinery and his own trucks and front loaders which make use of prop shafts as a part time job. He retired as a lecturer after thirty years in the service of the university in 2005. He is currently a consultant in failure analysis, forensic investigations in mechanical failures of engines and transmissions.

[21] Mr Von Wielligh testified that he examined the propshaft as well as some loose gear box components which John Williams sent to him on 11 March 2013 at his working station. These components belonged to the truck in issue.

[22] Mr Von Wielligh testified further that after he had examined and analysed those parts and in line with his own experience as a mechanical engineer he came to the conclusion that:

“[T]he separation of the spline occurred ...at the rear axle. The ...two bolts [at the flanges at the rear axle] came loose,...two bolts remained in position when the flanges moved open due to the angle of the

⁶ Mr Coetzee was not called as an expert witness. Nor was the prescribed Expert Notice given in terms of the Rules of Practice of this Court. Despite the plaintiff's attempt to rely on him as such, he could not be relied on as an expert as correctly so objection to by the defendant, he was treated as an ordinary witness.

serrations, they were forced apart and that caused [a] bending on the bottom bolts until they finally broke and then the driveshaft or the propshaft, separated from the flange at the rear end of the vehicle. It would then fall down. It was rotating...and that is why when the splines pulled out of that tube there was some damage because it was caused because it was bending. It then fell out, fell onto the road. We have seen some scratch marks which would be there; it is typical of ending up on the street, on the tarred road. The front section of the driveshaft with the front universal still coupled onto the gearbox, would then be free to swing to the side, any side, it doesn't matter, swing to the side. It will stay there due to centrifugal force and with the rotation of that engine which is still running readily fast at this point in time, it would destroy anything in its way and is why the oil cooler, the retarders, everything was knocked to pieces by the swinging around piece of driveshaft, everything was knocked remained attached to the gearbox. The front section of the driveshaft or propshaft with the front universal remained coupled onto the box and was then free to swing to the side. This shock then caused breakage of the universal cups which caused the failure of the front universal of the gearbox side.

[T]he separation occurred at the rear end and because of this separation due to the two bolts not being proper[ly] tightened once that failed and the driveshaft/propshaft dropped, it pulled out of the slip joint and the remaining portion then swung around and caused the damage. The only reasonable conclusion that I could draw was that the propshaft must have failed at the flanges at the rear axle. The reason for that was that at least two of the four bolts were not properly tightened with a torque wrench.⁷ (Own emphasis)

- [23] His view was that generally when the gearbox is put together, the bottom bolts are easy to put in and tighten with a torque wrench. The top ones are not easy to reach with the torque wrench. It is usually required that the vehicle be

⁷ See page 51-52

moved forward or rearwards to turn the propshaft properly and at a particular angle so that the top bolts can be reached easily. Sometimes as it has happened from time to time in his experience the workers forgot to tighten the last bolt(s) properly.

[24] Mr Von Wielligh was of the view that considering the substantial damage on the rear differential at the rear axle as depicted on photographs 35 to 42⁸, the breakaway of the propshaft was from the flange and not from the universal. If the failure occurred at the front end first as the defendant argued, the gearbox would have come apart and the whole propshaft would have fallen out. With the vehicle moving forward, it would have ended up on the road and the propshaft would have, taking into account its length, swung around in such a way that it would have destroyed the chassis beams, the tanks, everything in its way and would even have ended up as a whole on the road because of its length. In this case it could not have been the case. It was the small part of the propshaft that swung around and thus caused the damage at the rear part near the gear box side only.

[25] Mr Von Wielligh was clear and consistent in his evidence. Cross examination did not expose any discrepancies or inconsistencies in his evidence. He made some concessions. He conceded that he didn't interview the driver of the truck to establish exactly what transpired just before the vibration or at what speed the truck was travelling or the road conditions prior to the incident. He conceded also that he did not establish whether anyone else including the plaintiff had done work to the propshaft of the truck after it was delivered back to the plaintiff after it was repaired the first time in December 2010. Neither did he know who fastened the two bolts that were loose and fell out. He maintained that his findings were, based on the information he was provided with by Mr Coetzee or Booysen that New Vaal were the last people to work on the truck when the truck down the first time. He was also adamant

⁸ Scratches and serrations on the flange on the differential or rear axle (photo 35). Photo 36 is a closer range or from another angle of photo 35. Photo 38 depicts the flange on the propshaft at the rear axle. Photograph 39 shows the serration or groves on the propshaft of the coupling.

that what the defendant's experts indicated was the cause of damage and how it could it have happened was improbable.

[26] **Mr Petrus Johannes Lubbe**, the defendant's mechanic over seven years testified that he was the mechanic that refitted the propshaft when the truck was at New Vaal during December 2010. He testified further that he could remember the truck in issue specifically, what work was done on it and that he and the apprentice he worked with on the day in question, Pieter Botes, fastened and torqued the bolts and the flanges connecting the differential with the propshaft.

[27] During cross-examination it was revealed that he could not on his own remember any work done on the truck in issue, besides what was noted on the worksheet⁹, from which he refreshed his memory before the trial. He also admitted that he could not remember whether the bolts were torqued on that specific day and/or if all four bolts were torqued. He could not explain why the refitting of the propshaft did not form part of the worksheet and/or the account as far as the labour is concerned. He could not say categorically whether he or his apprentice torqued all four bolts as prescribed on that specific day although as he insisted they usually did. He conceded that, as the author of the worksheet, he did not indicate on the worksheet that the propshaft had to be refitted. Secondly although not the author of the statement of account he could not explain why the costing for the refitting of the propshaft was not reflected on the statement of account. Ordinarily New Vaal like all in the industry charged for any work done per the time spent on such work. In this instance thirty minutes.

[28] **Mr Marc McKernan** testified that he was the Group After-Sales Manager at New Vaal. He testified that once he was informed that the allegations were made New Vaal was responsible for the damage to the plaintiff's truck; he inspected the truck in the presence of Mr Ronnie Coetzee at the Ladybrand workshop. He disagreed with the plaintiff's on the cause of damage and

⁹ The worksheet was admitted as exhibit C.

consequently contacted Mr Lyster as an assessor, in his private capacity to obtain his opinion.

- [29] During cross examination he admitted that when the claim was made against New Vaal he called New Vaal's insurance company to institute a claim. Mr Lyster's opinion was sought in that respect not necessarily to determine the cause of the damage and how and where it started.
- [30] **Mr Gary Alexander Brown** testified that during 2010/ 2011 he was working for Mercedes Benz, South Africa, as a Technical Specialist team leader, Commercial Vehicles After-Sales. Although not called as an expert, he was a properly qualified heavy vehicle mechanic. In 2013 he was working for New Vaal as the general manager After Sales. Whilst at Mercedes Benz during 2010 he, as part of the warranty department and the Technical Department, supplied the damage code, 04102047, to John Williams. The mileage on the truck in issue, 449,621km, was within the warranty period of the truck i.e. 450,000km. If the truck was below 450,000km Mercedes Benz had to pick up the tab so to speak for the damage. In this instance Mercedes Benz did not pick up the tab. Instead it only paid part of the damage, R107, 000. 00 as a goodwill gesture.
- [31] During cross examination he admitted that he was not the author of the document he was referred to on pages 157 to 159 which depicted the code he supplied to Mercedes Benz South Africa; that the R107, 000.00 was given directly to the dealership, John Williams, Ladybrand, not the customer. His evidence did not advance the defendant's case in any way.
- [32] **Mr Anthony Lyster**, the defendant's expert testified that he has done his apprenticeship in mechanical engineering since 1958; worked for different companies in Malawi and South Africa when he migrated to South Africa in 1967 specialising in major engine overhauls, repairs, medication and design work until he formed his own company Lyster Assessment Services in 1999. Although he did not have any formal education apart from schooling he worked in the same area of repairing and maintenance of engines of trucks,

tractors as well as heavy plant machinery over three decades. Under Lyster Assessment Services he represents insurance companies in claims against them. He does defective workmanship claims and accident claims; reconstruction of accident scenes and assessment in respect of mechanical failures.

[33] He testified further that on 8 March 2011, almost six weeks after the incident had occurred on 28 January, he accompanied Mr McKernan to Mercedes Benz, Ladybrand, to look at the engine of the truck in issue. His first observation upon his arrival was that a new gearbox was already fitted, the propshaft in dispute i.e. the long and short part thereof were on a drum. As he inspected the parts available for inspection and after making his observations he made notes. He thereafter met with Mr Von Wielligh to discuss what they had observed. They disagreed on the cause of the damage. Each compiled his own report.

[34] In his conclusion in his report he noted:

“If a person studies the way in which this propshaft connects together, this scenario (which is that all bolts were not properly fastened as set out in paragraphs 2 and 3) does not make sense to have done this damage. If the rear flange had come loose on the propshaft, the end piece of the propshaft would have come out and fallen into the road as it is on a sliding joint that allows for movement from the rear differential. Because it can pull apart...The remaining front portion would have spun around at a huge velocity and damaged the chassis ,the tanks, the air piping and the surrounding components, but I found no damage here...

A further scenario could be that the front universal joint had failed, but then again this is also strange because there would have been so much vibration going through the truck that the driver would have had to know that something was wrong and would be almost impossible to drive the vehicle...The front universal shows signs of collapse and severe hammering but the universal crossing seems undamaged...

What caused the damage to the truck is the front universal collapsed...”

[35] During cross examination, he refused to accept that the longer end of the propshaft was retrieved at the back of the truck after the occurrence of the incident. He was constrained to admit that if the bolts had been fastened by hand at the flanges at the back, by even a strong person, only about 10 nm could have been obtained and not 160 nm as prescribed. In this instance, his evidence was that the truck would have vibrated violently and would not have able to travel more than 100 km. He was at pains to concede that he had originally agreed with Mr Von Wielligh on the cause of the damage to the truck, at a meeting they had during March 2011.

[36] The plaintiff’s claim is seated in contract, an oral agreement. The terms and conditions of the agreement were common cause between the parties as confirmed in their opening address. In its Particulars of Claim¹⁰ the plaintiff alleged that the defendant failed to comply with its obligations by failing to repair the truck in a proper and workmanlike manner in that the truck’s propshaft broke off on 28 January 2011, fell out of the truck and caused damage to the truck. Although the defendant in its plea as well as in Request for Further Particulars did not deny the existence of the agreement between the parties as couched (i.e. that the defendant had the obligation to refit the propshaft properly and in a workmanlike fashion) it later argued that the plaintiff actually relied on a delict but failed to plead or even prove same. It argued further that the plaintiff was obliged to seek its remedies within the contours of the agreement and was not entitled to resort to a delictual remedy. On that basis the claim ought not to succeed.

[37] In order for the plaintiff to succeed in this case it must prove on a balance of probabilities that the defendant failed to comply with the terms and conditions of the contract between the parties in that it failed to complete the work in a

¹⁰ Para 6 of the Particulars of Claim, Transcript, p233

proper and workmanlike fashion in that the truck's propshaft came loose on 28 January 2011 and caused damage to the truck. On the pleadings it is clear that the plaintiff relied on the agreement between the parties i.e The obligation to perform work in a workmanlike manner was part of the agreement, not a delict as the defendant later argued.

- [38] In any event where there may be a concurrence of claims as it seems to be argued by the defendant in its closing arguments, the court in **Holtzhausen v Absa Bank Ltd** 2008 (5) SA 630 (SCA) stated the position as follows:

‘[6] Lillicrap decided that no claim is maintainable in delict where the negligence relied on consists in the breach of a term in a contract. That is quite apparent from what was said by Grosskopf AJA at 499A - 501H. The passage begins:

‘In applying the test of reasonableness to the facts of the present case, the first consideration to be borne in mind is that the respondent does not contend that the appellant would have been under a duty to the respondent to exercise diligence if no contract had been concluded requiring it to perform professional services.’”

The court emphasised at 499D - F:

“The only infringement of which the respondent complains is the infringement of the appellant's contractual duty to perform specific professional work with due diligence; and the damages which the respondent claims, are those which would place it in the position it would have occupied if the contract had been properly performed. In determining the present appeal we accordingly have to decide whether the infringement of this duty is a wrongful act for purposes of Aquilian liability.”

The court¹¹ at approved the following passage written by **JC van der Walt** that :

“The same conduct may constitute both a breach of contract and a delict. This is the case where the conduct of the defendant constitutes both an infringement of the plaintiff's rights ex contractu and a right which he had independently of the contract.”

The judgment went on to point out (at 500A - B) that:

“Apart from the judgments in **Van Wyk v Lewis** (supra) this Court has never pronounced on whether the negligent performance of professional services, rendered pursuant to a contract, can give rise to the actio legis Aquiliae.”

The Court then gave reasons why Aquilian liability should not be extended to cover the respondent's claim (at 500F - 501G) and concluded (at 501G - H):

“[6] To sum up, I do not consider that policy considerations require that delictual liability be imposed for the negligent breach of a contract of professional employment of the sort with which we are here concerned.

[7] **Lillicrap** is not authority for the more general proposition that an action cannot be brought in delict if a contractual claim is competent. On the contrary, Grosskopff AJA was at pains to emphasise (at 496D-I) that our law acknowledges a concurrence of actions where the same set of facts can give rise to a claim for damages in delict and in contract, and permits the plaintiff in such a case to choose which he wishes to pursue. Thus in **Durr v Absa Bank Ltd** 1997 (3) SA 448 (SCA) ([1997] 3 All SA 1), a case which concerned the duties of an investment advisor recommending investment in debt-financing

¹¹ At p449I

instruments, Schutz JA found no difficulty in saying (at 453G):

‘The claim pleaded relied upon contract, alternatively delict, but as the case was presented as one in delict, and as nothing turns upon the precise cause of action, I shall treat it as such.’”

[39] The Court explained the position as follows in **NSC Carriers & Forwarding CC and Others v Hyprop Investments Ltd and Others** 2013 (1) SA 340 (GSJ):

“[18] Then there is of course the rule in **Lillicrap, Wassenaar and Partners v Pilkington Brothers (SA) (Pty) Ltd** 1985 (1) SA 475 (A) about a party who is in a contractual relationship with another, being obliged to seek his remedies within the contours of the agreement and may not as a rule resort to a delictual remedy. Insofar as that rule is concerned the plaintiff contends that it is not unsuited. It relies on the decision in **Holtzhausen v Absa Bank Ltd** 2008 (5) SA 630 (SCA), especially in paras 7 – 10. That court held that the **Lillicrap** case is not authority for the proposition that a party to a contract can sue only in contract merely because it is possible to construct a claim in contract. It also held that if a party can frame a claim clearly outside of the contract, in delict, it may choose to do so. Cloete JA held at follows in paras 7 – 8:

Lillicrap is not authority for the more general proposition that an action cannot be brought in delict if a contractual claim is competent. On the contrary, Grosskop AJA was at pains to emphasise (at 496D-I) that our law acknowledges a concurrence of actions where the same set of facts can give rise to a claim for damages in delict and in contract, and permits the plaintiff in such a case to choose which he wishes to pursue.

Thus in **Durr v Absa Bank Ltd** 1997 (3) SA 448 (SCA) ([1997] 3 All SA 1), a case which concerns the duties of an investment advisor, recommending investment in debt-financing instruments, Schutz JA found no difficulty of saying (at 453G):

‘The claim pleaded upon contract, alternatively delict, but as the case was presented as one in delict, and nothing turns upon the precise cause of action I shall treat it as such.’

In the present matter the pleadings cover a claim for damages for negligent misstatement. The plaintiff does not rely on the breach of any contractual obligation which the defendants or its servants may have owed him as constituting the negligence for this claim. The plaintiff's case as it was presented in evidence was that a right which he had independently of any such contract, was infringed. The decision in **Lillicrap** is accordingly of no application.'

[19] To advance its case the plaintiffs must meet this test. It is true that the plaintiffs do not invoke any right under the contract or allege any breach of it by the defendants. Significant reference is nevertheless made to the leases and to their terms. However, these references are merely to coherently contextualise the claim which is, after all, a complaint about wrongful inducement to act to their prejudice, which prejudice occurred in the form, at least in part, of signing the leases.

[20] I am therefore satisfied that, upon a proper reading of the claim as pleaded, the plaintiffs do not trespass in this respect across the line of contract.”

[40] As I indicated above the plaintiff's case was at all times based on the agreement between the parties. The plaintiff's claim is completely distinct

from a delict or a concurrence of claims as set out in the cases above. The reliance on such cases by the defendant was simply misplaced because in its plea and throughout the trial it did not dispute such claim but in fact pleaded that

“[I]t complied with all its obligations in terms of the oral agreement between the parties as set out in paragraph 3 of the Particulars of Claim.”

[41] Paragraph 3 of the Particulars of Claim reads:

“Op of ongeveer 15 Desember 2010, en te Bethlehem het eiser, soos verteenwoordig deur Mnr J Botha en werknemers van Mercedes Benz Suid Afrika, en verweerder soos verteenwoordig deur sy behoorlike gevolmagtigde werknemers, ’n mondelingse ooreenkoms aangegaan, met die volgende uitdruklike, alternatiewelik geïmpliseerde terme.

3.5 Die herstel werk deur verweerder onderneem sal behoorlik en vakkundig van aard wees...”

[42] Both parties led evidence of experts to prove their case. The extent to which a court may rely on such evidence has been dealt with in numerous cases. In **Schneider & Others v AA & Another** 2010 (5) SA 203 (WCC) the Court summed up the role of an expert¹²:

“...In **Zeffertt, Paizes & Skeen *The South African Law of Evidence*** at 330, the learned authors, citing the English judgment of ***National Justice Compania Naviera SA v Prudential Assurance Co Ltd (The 'Ikarian Reefer')*** [1993] 2 Lloyd's Rep 68 at 81, set out the duties of an expert witness thus:

¹² At 211E – 212B

- '1. Expert evidence presented to the court should be, and should be seen to be, the independent product of the expert uninfluenced as to form or content by the exigencies of litigation.
2. An expert witness should provide independent assistance to the court by way of objective, unbiased opinion in relation to matters within his expertise An expert witness should never assume the role of an advocate.
3. An expert witness should state the facts or assumptions upon which his opinion is based. He should not omit to consider material facts which could detract from his concluded opinion.
4. An expert witness should make it clear when a particular question or issue falls outside his expertise.
5. If an expert opinion is not properly researched because he considers that insufficient data is available, then this must be stated with an indication that the opinion is no more than a provisional one. In cases where an expert witness who has prepared a report could not assert that the report contained the truth, the whole truth and nothing but the truth without some qualification, that qualification should be stated in the report.”

[43] According to **Harms**¹³:

“The function of an expert is to assist the court to reach a conclusion on matters on which the court itself does not have the necessary knowledge to decide.”

[44] Mr Von Wielligh is a highly qualified mechanical engineering of over three decades. His expertise in the area was not cast in doubt taking into

¹³ *Civil Procedure in the Superior Courts*, B266 with reference to *Holtzhausen v Roodt* 1997 (4) SA 766 (W).

consideration his evidence and viewpoints combined with the inspection he did when the incident was still fresh and the damages were still clearly visible taking into account the time he spent examining the parts not long after the incident occurred. He was objective and made concessions where necessary.

[45] His evidence was clear that two of the four bolts on the flanges connecting the differential with the propshaft at the back, were not properly fastened or torqued, which caused friction over a time-period, and an eventual breakage; that when the bolts broke at the flanges at the back, the long side of the propshaft came loose, slipped out of the joint and fell to the tarmac which evidence corresponds with the damages evident on the long part of the propshaft; that the damage caused to the gearbox and gearbox bell housing and related parts in the vicinity of the gearbox, was caused by the swinging around of the shorter end of the propshaft after the longer end has slipped out of the joint slip. This was also evident from the damage in the vicinity of the gearbox depicted on the photos.

[46] His evidence fitted in with what Mr Likotsi explained that the long part of the propshaft was found at the back of the truck after the occurrence of the incident. This was given credence by Mr Lyster who agreed with the findings as elicited by Mr Von Wielligh during their meeting during March 2011. He was corroborated by Mr Coetzee, who although not an expert had been working in the same area, mechanical engineering for John Williams, over three decades, in that from the outset he could see that the damage could not have been what was initially thought it was but the propshaft. Mr Lyster inadvertently also corroborated him when he also stated that the universal was intact at the back.

[47] He came through as an impressive witness even during cross examination: Answering all questions; making concessions where necessary; deferring some matters to relevant witnesses without making any assumptions on things he had no personal knowledge about; and considering options and different scenarios presented to him by the defence.

- [48] After cross examination, and considering his evidence as a whole, I had no reason not to accept his evidence as honest, credible and reliable.
- [49] Mr Botha's evidence and that of Mr Likotsi indicated one thing clear that there was no other person or service provider that worked on the propshaft except cleaning the radiator. To clean the radiator one need not fiddle with the bolts to the propshaft or torque bolts. There was no reason to speculate on who else could have worked on refitting the propshaft. The period between 21 December and January 2011 was not that long. No other evidence was put before the court to think otherwise. It would still not make sense for the plaintiff to have worked on the truck on major parts when it was aware that it was under guarantee and could be repaired professionally by Mercedes Benz anytime.
- [50] The defendant's expert, Mr Lyster on the other hand was not an impressive witness. He failed to give logical answers to simple questions by simply refusing to consider scenarios presented to him including Mr Likotsi uncontested evidence that the long part of the propshaft was found behind the truck.
- [51] In this instance he did not act as the defendant's an insurance assessor but accepted instructions on a private basis from the Mr McKernan, to give him an opinion as to whether to claim from the defendant's insurance company or not.
- [52] In his initial report (which was the only report), he indicated that a further report will follow after further investigations but never submitted another report to clarify anything which he reflected upon after his investigations except to complain about the fact that he was only summoned to John Williams Motors, Ladybrand for the inspection after a reconditioned gearbox had been fitted to the truck; that the propshaft up for inspection by him and Mr Von Wielligh, was not the propshaft utilised in the plaintiff's truck at the date of occurrence without any substantiation and even reneging from that statement during cross-examination.

- [53] He was not of much assistance to this Court by refusing to answer certain questions and refusing to reflect and consider other scenarios presented to him by counsel for the plaintiff. For instance in refusing to consider Mr Likotsi's uncontroverted evidence that the long part of the shaft was behind the truck after the incident he was conscious that in that instance he would not be able to explain the clear damage to the longer end of the propshaft. Mostly he refused to do so not because he could not but because he did not want to deviate from what he wanted to be accepted as the only answer: his report with all its flaws ranging from typing errors, incorrect dates on when he started to work in this area and importantly the fact that he initially shared the same view with Mr Von Wielligh on the cause of the damage which was never removed from his report yet disavowed. He then lamely attempted to wriggle out of it by claiming that he felt ambushed by people from John Williams during the meeting.
- [54] He testified in general, as counsel for the defendant would acknowledge later, in "a stilted manner under cross examination." This for no apparent reason for a man who stated he had testified many times in courts in similar matters. I could, consequently, not rely on his opinion as it was clearly biased, not honest and somewhat not flowing with the event as it unfolded as Mr Likotsi explained in a very unsophisticated yet simple manner.
- [55] Mr McKernan and Mr Brown's evidence did not take the defence case anywhere. Mr Lubbe's evidence was also not reliable as he clearly could not remember much about this incident. Understandably so, because of the number of trucks he worked with between the period he testified about and when he worked on the truck in issue.
- [56] Having considered all the evidence and taking into consideration the fact that the onus rests on the plaintiff, I am satisfied that the plaintiff has on a balance of probabilities proved that
- (a) the first part of the propshaft to come loose was the long part , considering the clear damage on it as a result of breaking off and

falling to the road due to the bolts at the flanges being loose and not properly torqued; and

- (b) there was no other person or service provider that worked on the truck between 21 December 2010 and January 2011 when the truck broke down for the second time. I say so unreservedly because there was no other evidence other than that which the plaintiff led that since the truck was repaired by the defendant between 20 and 21 December 2010, no one else worked on the truck to the extent that the propshaft had to be removed and refitted except this one instance that the defendant worked on it.

[57] In the circumstances and on the probabilities, the only plausible reason would be that the bolts were not properly torqued as prescribed by Mercedes Benz South Africa. If the aforesaid bolts were not properly torqued, it goes without saying that the defendant's employees did not refit the propshaft in a proper workmanlike fashion, and that the defendant in the circumstances failed to comply with its obligations in terms of the oral agreement between the parties.

The conclusion that I reach is that the defendant caused the damages to the plaintiff's truck.

[58] In the circumstances, the following order is made:

ORDER

Judgment is granted in favour of the plaintiff, on the merits of the action, with costs.

B.C. MOCUMIE, J

On behalf of plaintiff:

Adv P. Zietsman SC
Instructed by:
Matsepes Inc

BLOEMFONTEIN

On behalf of defendant:

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