

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

Case No.: 3199/2010

In the matter between:

TRANSNET RAIL ENGINEERING LIMITED

Plaintiff

and

THE COURIER AND FREIGHT GROUP (PTY) LTD First Defendant

IMPROVO TRANSPORT AND TRADING CC Second Defendant

CORAM: LEKALE, J

HEARD ON: 26 & 27 AUGUST 2014

JUDGMENT BY: LEKALE, J

DELIVERED ON: 4 SEPTEMBER 2014

INTRODUCTION AND BACKGROUND:

- [1] On 9 July 2013 the first defendant (defendant) was ordered by Van Zyl J at the end of a trial on merits to pay the plaintiff's proved or agreed damages arising from the loss of a turbo-charger for a General Electric diesel- electric locomotive, which the plaintiff had entrusted to the defendant for transportation to

Swartkops in Port Elizabeth. The parties could, however, not agree on the plaintiff's quantum of damages and this is, therefore, the second leg of the action between the parties for determination of the plaintiff's damages.

- [2] During or between 27 February 2009 and 3 March 2009 plaintiff entrusted a Namibia 2 turbo XLS charger to the defendant for transportation on, *inter alia*, condition that the latter shall be liable for repairs and/or replacement of the turbo-charger in the event of it being damaged or lost. On 3 March 2009 the charger got lost in transit to Swartkops while in the custody of the defendant and the latter duly accepted total responsibility for the loss on 11 March 2009. The parties could, however, not settle the matter and the plaintiff, eventually, instituted action against, *inter alia*, the defendant for recovery of R444 479.47 in replacement costs together with interest at the prescribed legal rate from 19 March 2009 to date of payment. The defendant resists the claim on the ground that the amount claimed does not represent the value of the turbo-charger when it got lost. The plaintiff tendered evidence to prove its damages while the defendant, on its part, elected to close its case without leading any evidence.

DISPUTE

- [3] The parties are effectively at variance on whether or not the amount claimed represents the plaintiff's damages with the

defendant contending that it does not constitute the value of the cargo when it got lost while the plaintiff maintains that it represents the fair, just and reasonable replacement value of the lost charger.

[4] The parties are, further, in dispute over whether or not interest should be levied on the proved damages from 19 March 2009 with the defendant contending that same, if payable, should be charged from the date of judgment on quantum because that is the date on which the claim became liquid.

[5] The parties are, furthermore, at loggerheads over whether or not all the witnesses who testified for the plaintiff were experts so as to be entitled, if payable, to qualifying fees and expenses with the defendant maintaining that only one of the witnesses qualified as such in the present proceedings regard being had to the evidence tendered.

PLAINTIFF'S CASE

[6] In support of the claim the plaintiff adduced the evidence of three witnesses who collectively testified that the amount claimed was reasonable and that the lost charger had no market value because there is no way to determine such a value in respect of a used turbo- charger.

- 6.1 **MR WAYNE ANDREW RUDMAN** testified that he holds a national diploma in engineering and is a qualified diesel-electric fitter since 1998. He is currently employed at the plaintiff's Centre of Excellence at Swartkops Locomotive Depot in Port Elizabeth as operations manager of Rotating Machine Business. In 2009 his unit was tasked with rebuilding and assembling a turbo-charger for a diesel-electric locomotive in order to replace a lost one. For the preceding purpose they sourced parts from their store locally and used parts they received from General Electric in the United States of America (USA). The actual cost price of rebuilding the charger in question was R354 454.83 but they charged R444 479.47 because they added a 25% mark-up in accordance with their business practice as a unit. The relevant turbo-chargers and other spares for diesel-electric locomotives are sourced from the USA and it would have cost them about twice that amount to get a new turbo-charger from the USA. The turbo rotor used in the process was sourced from Bloemfontein and it was the most expensive part at the actual cost price of R145 888.36. A turbo-charger has a maximum lifespan of about 20 years.
- 6.2 **MR CORNELIUS JACOBUS VILJOEN** testified to the effect that he has been with the plaintiff for 37 years and is currently customer services manager at Bloemfontein and a qualified diesel-electric fitter. In his capacity as

such he received a diesel- electric locomotive in a running condition from Trans- Namib Holdings in Namibia for service and/or refurbishment. The client informed him that the turbo-charger had not been overhauled for the past five years and it was, as such, due for scheduled overhaul. They arranged for the turbo- charger, which was also in a running condition, to be transported to the Centre of Excellence in Port Elizabeth for strip and quote and the defendant was tasked with the necessary transportation. The turbo-charger, however, got lost en route to Port Elizabeth. The plaintiff was, therefore, obliged to replace the lost charger within the limited time period. The replacement turbo-charger was sourced in house from the plaintiff's Centre of Excellence in Port Elizabeth. No new turbo- chargers could be bought in the Republic of South Africa as they come from the USA where they are manufactured. The value of the turbo charger at the time it was lost, could not be determined because it was neither seen nor received by Port Elizabeth. The value of the replacement turbo-charger was fair and reasonable as a new charger would have cost almost twice the price. It was a normal business practice for Port Elizabeth to mark- up the actual cost price and in his unit they also employ such a practice.

6.3 MR KEVIN PROZESKY testified to, *inter alia*, the effect that he holds a B.Sc. degree in mechanical engineering

and has been continually associated with railroad locomotive maintenance since 1975 when he began his career. He is very familiar with the relevant turbo-charger. A used turbo-charger has no market value to his knowledge, because there exists no trade in used turbo-chargers amongst users. There is, therefore, no way to determine a market value for a used charger. The price of a new turbo-charger for Transnet from General Electric in the USA would be in the region of ZAR781 203.82. The price of ZAR444 479.47 is fair insofar as it has already made provision for the fact that the replacement turbo-charger was not new.

CONTENTIONS BY THE PARTIES

- [7] Mr De Wet, for the plaintiff, submits that, as ordered by the court, the defendant is obliged to pay the plaintiff's proved damages which relate to the extent to which the plaintiff was out of pocket as a result of the replacement of the lost turbo-charger. It is clear, according to him, from evidence that the plaintiff was obliged to replace the lost turbo-charger within constraint time period. It is, further, patent that the plaintiff employed the cheapest means to replace the lost charger, because the replacement costs paid were fair and reasonable. There exists no legal basis for the plaintiff to pay the value of the turbo-charger as at the time of the loss. The plaintiff was obliged to find a suitable replacement and not the exact

replacement. There was no strip and quote because the cargo was lost before it could reach its destination and, as such, no assessment could be made. Port Elizabeth was entitled to charge profit because it was not responsible for the loss. The defendant caused the loss and is responsible for the same. The three witnesses who testified for the plaintiff were all experts and were, as such, entitled to qualifying fees and reasonable expenses. The claim was, at all times, clear to the defendant with the demand for payment having been made as early as 19 March 2009. Generally unliquidated debts as determined by, *inter alia*, the court bear interest which runs from date of service of a demand or summons whichever is the earlier.

- [8] Mr Steenkamp for the defendant, *inter alia*, contends that the defendant should be absolved from the instance, because no best evidence with regard to the value of the turbo-charger when it got lost was presented. The plaintiff could have adduced the relevant evidence but failed to do so. No best evidence was presented with regard to the condition of the charger as at the time of the loss. In the event of the court accepting the replacement costs as payable then and only in that eventuality the real actual costs of the replacement turbo-charger are payable because the 25% mark-up was not supposed to be charged. The most expensive parts used to rebuild the charger could possibly not have been used had the charger not been lost because the lifespan of the charger was

16 to 20 years and it could only be serviced four to five times according to Mr Rudman. Only the costs relating to one expert, viz. Mr Rudman, should be ordered because the other witnesses' evidence was not relevant to the issue relating to the value of the turbo-charger when it got lost. Interest should be payable from the date of judgment because that is the date on which damages or the debt became liquidated.

APPLICABLE LEGAL PRINCIPLES

- [9] The parties are correctly and effectively in agreement that damages payable relate to the extent to which a party felt the diminishment or loss of the property involved. Where the damages relate to loss of property the amount payable, as damages, is the market value of such property from any source to which the aggrieved party might reasonably have gone in order to replace such property.

(See: **Desmond Isaacs Agencies (Pty) Ltd v Contemporary Displays** 1971(3) SA 286 (T) 287.)

- [10] As Mr De Wet correctly and effectively points out, generally once unliquidated claims have been determined by the court, they bear interest from the earlier event between service of a demand and service of summons on the debtor unless the court directs otherwise in the interests of justice.

(See: **Thoroughbred Breeders' Association v Price Waterhouse** 2001 (4) SA 551 (SCA) par [81] and sections 2A(1); (2)(a) and (5) of Prescribed Rate of Interest Act 55 of 1975.)

- [11] Expert witnesses qualify themselves, if necessary, to give expert evidence and are generally entitled to qualifying fees and reasonable travelling and accommodation expenses where they were reasonably necessary.

(See: **Donaldson v Seaward** 1958(2) SA 198 (O).)

APPLICATION OF LEGAL PRINCIPLES AND FINDINGS

- [12] The parties are effectively and basically in dispute over the costs in respect of which the plaintiff suffered damages insofar as Mr Steenkamp submits that no evidence was led as to the value of the turbo- charger when it got lost while Mr De Wet contends that the replacement costs of the turbo-charger are clearly before the court.
- [13] It is common cause between the parties that the turbo-charger was replaced and that time limits were applicable as to the return of the diesel- electric locomotive to the plaintiff's client in Namibia.

[14] It is, further, not in dispute that the contract between the parties saddles defendant with the liability for replacement costs in the event of loss of the cargo in question. In my judgment the plaintiff is entitled to damages arising from the replacement of the turbo- charge in question because its damages flow therefrom and not from any diminishment in the value of the turbo-charger as at the time of the loss. The plaintiff's liability to its client arises from the loss of the charger and not from any damage thereto. The plaintiff was obliged to replace the turbo charger because it had received a running locomotive inclusive of a running turbo-charger. Its duty to the client consisted of restoration of possession of a running locomotive which includes a running charger as Mr Viljoen correctly emphasised. The value of the lost turbo-charger in a case where it was replaced is not relevant to the issue as Mr De Wet correctly points out. The question is whether or not the replacement costs were reasonable in the sense that the plaintiff employed reasonable or cheaper means to make the replacement.

[15] I am persuaded by the evidence before me that the replacement costs were just and reasonable. In this regard I can only point out that Mr De Wet is correct in his submission that no evidence was presented to show that the plaintiff could have reasonably employed other cheaper means to replace the charger. In my view, on available evidence the plaintiff could not have mitigated its damages other than by avoiding the costs of a new turbo-charger. I am, further, persuaded by available

evidence that the plaintiff's Centre of Excellence was justified to make profit because the rebuilding and assembling of the turbo-charger in question was a normal business transaction

[16] I am, further, satisfied, as Mr De Wet submitted, that the witnesses called were all relevant expert witnesses insofar as they testified about the need and means to replace the charger in question and their evidence in that regard was necessary.

[17] The defendant became aware of the damages claimed long before the trial date and, in law, such damages bear interest from the date of demand and not from date of judgment. No evidence whatsoever was presented to justify a departure from the applicable general rule.

ORDER

[18] In the result the claim is upheld.

[19] The first defendant shall pay the plaintiff an amount of R444 479.47 together with interest at the prescribed legal rate calculated from 19 March 2009 to the date of final payment.

[20] First defendant shall further pay plaintiff's costs together with the reasonable qualifying fees and expenses of Messrs Rudman, Viljoen and Prozesky.

L. J. LEKALE, J

On behalf of plaintiff:

Adv P.J.T. de Wet SC
Instructed by:
Rossouws Attorneys
BLOEMFONTEIN

On behalf of respondents:

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