

REPUBLIC OF SOUTH AFRICA



NORTH GAUTENG HIGH COURT, PRETORIA

- (1) REPORTABLE: Electronic Reporting.
(2) OF INTEREST TO OTHER JUDGES: No
(3) REVISED.

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Case No. 25392/2011

In the matter between:

TWO PEDESTRIANS MINING CC

Plaintiff

and

EXXARO NBC COAL

Defendant

JUDGMENT

MEYER, J

[1] This is an action for damages to property. The plaintiff's claim is based on a contract of carriage of goods and in the alternative in delict. Determination of the quantum of the plaintiff's damages was separated and postponed *sine die* at the

commencement of this trial in terms of Rule 33(4) of the Uniform Rules of Court and the only remaining question to be determined at this stage is the liability of the defendant.

[2] The defendant owns and operates various coal mines in the Belfast district, one of which is its Exarro Glisa Colliery ('Glisa'). The defendant utilises the services of outside contractors to crush and screen coal extracted at Glisa. One such contractor was the plaintiff which conducts business in the mobile crushing and screening industry.

[3] An agreement was concluded between the plaintiff and the defendant during March 2008 in terms whereof the defendant engaged the services of the plaintiff to crush and screen 200 000 tons of coal at Glisa for a consideration of R16.70 per metric ton excluding VAT. The defendant was also obliged to pay to the plaintiff an establishment and de-establishment cost in the sum of R52 000.00 excluding VAT. The establishment and de-establishment cost was the consideration which the defendant agreed to pay to the plaintiff for the plaintiff transporting its equipment to, of setting it up at, and of removing it from Glisa once it had finished crushing and screening the 200 000 tons coal. The plaintiff agreed to comply with all the defendant's '... Health, Safety and Contractors pack requirements.' I refer to this agreement as the initial agreement.

[4] During March 2008 the plaintiff established its equipment - a Terex Pegson XA400 Mobile Jaw Crusher, a Powerscreen Chieftain 1400 Mobile Screen and two Volvo L120 front-end-loaders fitted with 5.4 cubic metre buckets – at a site on Glisa that was designated by the defendant's then mine manager, Mr Sakkie Nkosi, which site was at the main plant area. The plaintiff appointed its employee, Mr Len Burton, as the site manager of this site. Pursuant to the conclusion of the initial agreement the plaintiff

crushed and screened D-grade coal for the defendant at this site, which coal the defendant supplied to SAPPI. The plaintiff was permitted to conduct the crushing and screening activities up to twelve hours a day.

[5] It is common cause that Mr Burton represented the plaintiff and Mr Nkosi the defendant in the conclusion of an oral agreement on or about the 19th of May 2008 in terms whereof it was agreed that the defendant would provide a horse and low-bed trailer combination to move the plaintiff's crusher to another site on Glisa and that an employee of the defendant would drive the horse and low-bed combination. The other site where the defendant required the plaintiff to continue the crushing and screening activities was about three kilometres away from the site at the main plant area where the plaintiff was operating at the time. The plaintiff was not obliged to pay to the defendant a reward or freight for the carriage. I refer to this agreement as the contract of carriage. Certain further tacit terms averred by the plaintiff in its particulars of claim are denied by the defendant and other express or tacit terms pleaded by the defendant in its plea are denied by the plaintiff. I shall return to the disputed terms.

[6] Mr Lessing, who is a member of the plaintiff, and Mr Burton testified on behalf of the plaintiff. The defendant's then mine manager, Mr Nkosi, who is no longer employed by the defendant, its workshop or engineering foreman, Mr Mahlangu, and the only driver of its horse and low-bed trailer combinations testified on behalf of the plaintiff. Mr Burton did not impress me as a witness. The evidence given by Messrs Nkosi, Mahlangu and Makuwa are very much more convincing and probable on several of the disputed issues.

[7] Mr Burton testified that Mr Nkosi had asked him for the plaintiff's crusher, screen and front-end loaders – 'the whole set-up' – to be moved to another site, because the defendant's crusher at such other site had broken down. Mr Burton informed him that he needed to arrange a low-bed for the moving of the screen and crusher through his immediate supervisor, Mr Lessing. Mr Nkosi then offered that the defendant's low-beds could be used to transport the plaintiff's equipment to the other site. It is undisputed that the defendant had two low-beds, a 30 ton low-bed and an 80 ton one. Mr Burton telephoned Mr Lessing who gave permission for the plaintiff to use the defendant's low-beds. Mr Burton thereupon informed Mr Nkosi that Mr Lessing had agreed for the plaintiff to use the defendant's low-beds.

[8] Mr Lessing testified that Mr Burton had called him and had informed him that Mr Nkosi had requested him to move the plaintiff's crusher to another site. He testified that he recalled that the reason for the required move was because the defendant experienced a problem at one of its plants and required a crusher to keep the plant going. That according to Mr Lessing is why the defendant did not require the plaintiff's front-end loaders and screen also to be moved. This evidence of Mr Lessing and that of Mr Burton that Mr Nkosi requested that the plaintiff's 'whole set-up' be moved is contradictory. Mr Lessing testified that he informed Mr Burton that the defendant would utilise Highveld Radiators - a company in Middelburg usually engaged by the plaintiff to move its equipment - to move its crusher. Mr Burton then informed him that the defendant had offered to send its own low-bed to move the crusher in order to save costs. Mr Burton conceded under cross-examination that he was not informed by Mr Nkosi that the defendant wished to save costs and such was merely his own deduction.

Mr Lessing testified that he gave permission to Mr Burton for the defendant's low-bed to be used to move the plaintiff's crusher provided that it was the correct low-bed.

[9] Mr Nkosi testified that he had gone to the site where the plaintiff was operating on one of his daily visits the day before the incident, when Mr Burton brought it to his attention that the stockpile of coal would be depleted in a day or two's time and he had asked Mr Nkosi's directive as to which other stockpile of coal the plaintiff should process thereafter. Mr Nkosi told him that there was a stockpile of similar coal to that which the plaintiff was contracted to process in an adjacent section and that the plaintiff must move to that site. Mr Burton enquired from him whether the defendant could assist the plaintiff with a low-bed, because there would be a delay if he needed to arrange one from Middelburg. Mr Nkosi undertook to speak to the defendant's workshop foreman and he told him that he would assist if one was available, otherwise Mr Burton would need to arrange one himself. Mr Nkosi spoke to the defendant's workshop foreman, Mr Mhlangu, and he informed him that he had received a request from a contractor to move its crusher and screen to another site, and he enquired from him whether there was any possibility that he could assist with a low-bed. Mr Mhlangu confirmed that a low-bed was available.

[10] Mr Mahlangu testified that Mr Nkosi had called him and that he had asked him what his low-bed availability was. Mr Mahlangu confirmed that the defendant's 30 ton low-bed was available. Mr Nkosi informed him that the plaintiff would like to use it the next day and that he should provide one. Mr Mahlangu confirmed to him that he would send a driver with the low-bed to the plaintiff the next morning. Mr Mahlangu requested Mr Makuwa to take the 30 ton low-bed to the plaintiff's site. He informed him that the

plaintiff's site manager would load a machine onto the low-bed and that he must then go to where they tell him to take it. Mr Makuwa also testified that his foreman, Mr Mahlangu, instructed him on the day of the incident to use the low-bed which he had pointed out to Mr Makuwa and to take it to 'contractors who wanted to move a machine' – and he also later on told him that it was a crusher - and that they would load it.

[11] It is common cause that Mr Makuwa arrived at the site at which the plaintiff was operating with a horse and the defendant's 30 ton low-bed. He parked the horse and low-bed combination where it was indicated to him to do so. Mr Makuwa stood a distance away and he did not participate in any way in the loading of the plaintiff's crusher onto the low-bed. It was loaded by its operator, who was an employee of the plaintiff, and by Mr Burton, who was standing on the low-bed and directing the operator of the crusher to ensure its loading onto the centre of the low-bed. Once the crusher had been loaded, Mr Makuwa, who was assisted by the plaintiff's operator, fastened it with chains to the low-bed. It was part of Mr Makuwa's job description to ensure that a load is securely fastened. Mr Makuwa and the plaintiff's operator got into the horse. The horse and low-bed combination with the crusher on the low-bed toppled over to the right side and the crusher landed onto its side on the ground immediately as the horse and low-bed combination moved forward or pulled off. Mr Makuwa testified that the truck started to shake when he released the hand brake and then toppled over to its side. The estimation is that the horse and low-bed combination only moved about 30 to 50 centimetres forward. The crusher was properly fastened to the low-bed and it remained fastened even after the toppling over.

[12] The plaintiff's crusher was damaged and it now seeks to recover the amount of damages suffered by it as a result thereof from the defendant *ex contractu* or *ex delicto*. It is common cause that '[t]he only cause of the toppling over of the low-bed was the overloading of the low-bed coupled with the movement of the low-bed.'

[13] Counsel for the plaintiff, Mr EB Clavier, and for the defendant, Ms MM Lingenfelder, were *ad idem* that the defendant was a 'private' or casual carrier of goods in this instance. The common law liability of a private carrier of goods is concisely and in my view accurately stated as follows in *LAWSA Vol 2 First Reissue* para 78:

'The private carrier may undertake the carriage of goods either for remuneration or gratuitously. Where a private carrier of goods is remunerated for his services he is liable for damage to or loss of the goods he carries as a depositary, that is for negligence. Where a private carrier gratuitously undertakes the carriage of goods he is liable as a gratuitous mandatary, that is for gross negligence or malfeasance only. The common law liability of the private carrier in regard to the goods he carries may be modified or expanded by agreement between the carrier and the consignor or consignee.'

Footnotes omitted.

[14] Gross negligence or malfeasance on the part of the defendant has not been pleaded nor established by the evidence. This was in my view correctly conceded by the plaintiff's counsel. The contractual claim of the plaintiff is accordingly on common law liability principles doomed to failure if the carriage of its crusher was gratuitous and the liability of the defendant not modified and expanded by the tacit terms upon which the plaintiff relies. It was submitted by the plaintiff's counsel that the carriage was for reward since the defendant benefited from saving costs for which it would otherwise have been invoiced by the plaintiff and its supply was not unnecessarily delayed, allowing it to supply more coal to its customers. There is, in my view, no merit in counsel's submissions in this regard.

[15] The liability for the costs involved in moving the equipment of the plaintiff from one site on to another on Glisa in instances where the defendant's low-bed is not utilised is in dispute. Mr Lessing testified that the costs involved in obtaining the services of a carrier such as Highveld Radiators would have been in the region of R3000.00 – R4000.00. He testified in chief that the plaintiff would in such event have recovered the costs incurred in moving its crusher from the defendant. Under cross-examination, however, he testified that it was not a hard and fast rule that the defendant would be invoiced for the costs of such a move and that 'as a rule of thumb' he would nine out of ten times invoice a mine for such costs incurred. Mr Lessing was unable to say whether the plaintiff invoiced the defendant for subsequent internal moves of its equipment on Glisa.

[16] Mr Nkosi testified that the defendant's low-beds are used to convey the plaintiff's equipment across the mine and are as a general rule not available to contractors. The defendant paid the plaintiff a fixed rate per ton no matter how long it takes the plaintiff to produce 200 000 tons coal. The costs of moving equipment internally on Glisa forms part of the plaintiff's operational costs and the defendant would not be responsible therefore. Mr Nkosi also testified that the defendant would pay for additional costs incurred by a contractor such as the plaintiff if it is proved by the contractor concerned that additional costs were incurred and if it could be justified why the defendant should pay such additional costs.

[17] I find the defendant's version on this issue more probable. If the costs of internal moves did not form part of the plaintiff's operational costs then one would have expected that the plaintiff's quotation would also have made provision for the payment

of such costs. Whether or not the plaintiff would have invoiced the defendant for the costs of moving its equipment on this occasion had the defendant's low-bed not been used and whether or not the defendant would have accepted the responsibility for the payment thereof are at best for the plaintiff matter of conjecture. I also accept on the evidence presented that a delay in the processing of the coal by the plaintiff would have had no impact upon the supply of coal by the defendant to its customers. Mr Nkosi testified in this regard that the plaintiff was crushing D-grade coal for supply to SAPPI and the defendant at the time had sufficient coal of that grade available to supply SAPPI for thirty days.

[18] In any event, any such incidental benefits that might have flowed to the defendant as a consequence of it having made its low-bed available to the plaintiff, whether at the instance of Mr Nkosi on the plaintiff's version or at the request of Mr Burton on the defendant's version, does not, in my view, amount to an express or tacit agreement between the plaintiff and the defendant regarding the freight to be paid for the service nor to the payment of remuneration to the defendant. Had it not been agreed by the parties that no freight was payable the defendant would have been entitled to the specific rate of freight as might have been agreed upon between them in that event or to its usual rate where no specific rate of freight had been agreed upon. See: *LAWSA Vol 2 First Reissue* para 80. Unless it had been otherwise agreed, the indirect consequential benefits accruing to the defendant by making its low-bed available to the plaintiff would in such event also not have constituted part of the remuneration that were to be paid to the defendant for the carriage. I accordingly find that the defendant was not paid or remunerated for the carriage of the plaintiff's crusher

and that the carriage was gratuitous. The defendant in terms of common law principles accordingly did not carry the more onerous liability of a private carrier that is paid for the carriage of goods.

[19] The plaintiff alleges further tacit terms of the contract of carriage, which are that in terms thereof the defendant would provide to the plaintiff a low-bed and horse that were capable of accommodating the size and more particularly the weight of the plaintiff's crusher; send an employee in the form of the driver of the low-bed and horse who was competent in the manoeuvring of the low-bed and horse and who was also aware of the maximum limits that the low-bed and horse could accommodate in terms of size and weight of particular machines and more particularly the plaintiff's crusher; deliver the plaintiff's crusher to its destination in the same good working condition in which the defendant found it; and that the defendant would convey the plaintiff's crusher with due care and diligence without causing loss or damage to it. The plaintiff further avers that the defendant breached the contract of carriage by providing a low-bed and horse combination that was unable to accommodate the plaintiff's crusher; a driver that was not competent to advise the plaintiff that the low-bed and horse combination could not accommodate the plaintiff's crusher; and by failing to convey plaintiff's crusher safely and allowing it to become damaged. The defendant denies the tacit terms averred by the plaintiff and its alleged breaches the terms of the contract of carriage. The defendant alleges that the contract of carriage contained the express or tacit terms that the plaintiff would ensure that the horse and low-bed provided by the defendant would be suitable for the transportation of the crusher and that the crusher

was loaded onto the low-bed and securely fastened. The plaintiff denies the additional express or tacit terms alleged by the defendant.

[20] The plaintiff's alternative delictual claim is based on the defendant's alleged duty of care not to cause damage to the plaintiff's crusher. The plaintiff avers that the sole cause of the damage to its crusher was the defendant's negligence and/or that of its driver, who were negligent in having provided a low-bed and truck combination which was incapable of carrying the size and weight of the plaintiff's crusher and of which fact they reasonably could and should have been aware of; in having failed to ensure that the low-bed could carry the plaintiff's crusher when they reasonably could and should have done so; and/or in having failed to avoid the plaintiff's crusher becoming damaged when by the exercise of reasonable care they reasonably could and should have done so. The defendant denies any negligence on its part or that of its driver and it pleads that the crusher was damaged as a result of the plaintiff's sole negligence or that of its employees in that they failed to ensure that the horse and low-bed were suitable to convey the crusher and/or they loaded the crusher onto the low-bed without ensuring that it could accommodate the plaintiff's crusher's size and weight.

[21] I have mentioned earlier on in this judgment that the plaintiff appointed Mr Burton as the site manager of the site upon which the incident in question happened. He was present at the site on a daily basis. Mr Burton managed the site and he took all the decisions at the site. He was responsible for all activities and for everything happening at the site, including the establishment and de-establishment of the site, supervising and ensuring the correct and safe loading and off-loading of equipment and machinery at the site, ensuring compliance with all the defendant's health, safety and contractors

pack requirements including the provisions of the National Mining and Health Act, and managing the plaintiff's employees and equipment at the site. Mr Burton as site manager was responsible to conduct what has been referred to as a 'hazard identification and risk assessment' or 'hira' prior to the commencement of any activity or operation at the site.

[22] Mr Lessing gave permission to Mr Burton for the defendant's low-bed to be used provided it was the correct one. Mr Burton knew the defendant had two low-beds. Both Messrs Nkosi and Burton were according to their evidence unaware that the defendant's 80 ton low-bed was not operational at the time of the incident. It is common cause that the defendant's 30 ton low-bed that was used for the carriage of the plaintiff's crusher was the wrong one. It was only suitable for the carriage of loads up to 30 tons. The weight of the plaintiff's crusher was 45 tons. The defendant's 80 ton low-bed would have been the correct one to use.

[23] Mr Burton was responsible for overseeing the loading process of the plaintiff's crusher onto the defendant's low-bed. It was his responsibility to ensure that the crusher was loaded onto the correct low-bed. This was, apart from the instruction that he received from Mr Lessing, part of his responsibilities as the site manager. Mr Burton conceded that the loading of the crusher required him to undertake the required hira or 'mini risk assessment' and that such assessment enjoined him to ascertain whether or not the defendant's low-bed was adequate to carry the plaintiff's crusher. Mr Nkosi testified that the site manager is in charge of such a move and responsible for it. He also testified that it was Mr Burton's obligation to undertake a hira before starting the operation of moving the plaintiff's crusher. If the low-bed that was sent to move the

plaintiff's crusher turned out not to be the right one during the risk assessment that Mr Burton was supposed to undertake, he ought to have sent it back.

[24] Mr Burton's evidence that he did what he could to assess whether the defendant's 30 ton low-bed was the correct one is untenable. Mr Burton conceded that he only knew the approximate dimensions of the plaintiff's crusher at the time of this incident but that he did not know its weight even though a plate was mounted on its side displaying its gross weight to be 45 tons. Mr Burton testified that he saw the side plate but that he did not read it. Mr Burton also conceded that he was aware that the defendant's low-bed had to have a plate mounted on it that displays the maximum weight that it was capable of carrying. It is also undisputed that a conspicuous plate was indeed mounted on the side of the defendant's low-bed which displayed 30 400 kilograms as the maximum weight it was capable of carrying. Mr Burton conceded under cross-examination that he would not have loaded the crusher onto the defendant's low-bed if he had established the carriage capacity of the defendant's low-bed and the weight of the plaintiff's crusher. Mr Burton's insinuation that everybody else – Messrs Nkosi, Mahlangu, Makuwa and the defendant's engineering staff – instead ought to have known the weight of the plaintiff's crusher simply does not convince.

[25] Instead of assessing the appropriateness of the defendant's low-bed to carry the weight of the plaintiff's crusher with reference to the carriage capacity of the defendant's low-bed and the gross weight of the plaintiff's crusher, Mr Burton testified that he thought that the low-bed 'might be a bit small' and he 'asked the driver if the low-bed was large enough to transport the crusher.' He testified that the driver told him that he had on a previous occasion moved a similar machine from Johannesburg to the mine

on the low-bed, which assurance Mr Burton accepted. Mr Makuwa denied that he spoke to Mr Burton while he was at the site. This occasion was the first time that he was required to move a crusher. Mr Makuwa also denied that he ever before moved a similar crusher from Johannesburg to the mine.

[26] I find it improbable that Mr Burton would have relied for the purpose of his risk assessment on the mere say so of the defendant's driver about a similar crusher that was conveyed by him on that low-bed. It is also not suggested that Mr Burton confronted Mr Makuwa after the incident about his assurance that the low-bed could accommodate the weight of the crusher or that he complained to Mr Nkosi about the alleged assurance that had been given to him. The 'Accident/Incident Investigation Report' that was completed by Mr Burton as part of the plaintiff's insurance claim arising from this incident contains a description of how this incident occurred. No reference is made to any assurance or representation that was given or made by Mr Makuwa to Mr Burton that the low-bed could accommodate the weight of the crusher. In answer to a further question about the action that had been taken or would be taken 'to overcome the basic cause(s) to prevent a reoccurrence' of this incident it is stated that 'Johan Pienaar to supervise all loading of equipment.' Mr Lessing also confirmed that he implemented such remedial action after this incident, namely that Johan Pienaar, a mechanic in the employ of the plaintiff, was to supervise all loading of equipment in future. Mr Burton in any event reasonably ought to have undertaken the risk assessment with reference to the weight of the plaintiff's crusher as opposed to accepting an alleged vague allegation of a 'similar crusher' that was conveyed on the low-bed. It is not suggested by Mr Burton that he enquired from Mr Makuwa what the

weight of the alleged similar crusher was that Mr Makuwa allegedly conveyed from Johannesburg to the mine. By his own admission Mr Burton did not know the weight of the plaintiff's crusher.

[27] In applying the officious bystander test I am of the view that the unexpressed provisions of the contract of carriage averred by the plaintiff can upon an examination of the express terms and of the legally implied terms of that contract and the relevant surrounding circumstances not be inferred and that the evidence on a balance of probabilities established the tacit term alleged by the defendant that it was agreed that the plaintiff would ensure that the horse and low-bed trailer provided by the defendant would be suitable for the transportation of the crusher. See: *Alfred McAlpine & Son (Pty) Ltd v Tvl Provincial Administration* 1974 (3) SA 506 (A), at 531 – 532; *Pan American World Airways Inc v SA Fire & Accident Insurance Co Ltd* 1965 (3) SA 150 (A), at 175C; *Shirlaw v Southern Foundries (1926) Limited* [1939] 2 KB 206, at 227; and RH Christie *The Law of Contract* 5th Ed, at 168 *et seq.*

[28] The circumstances were such that the plaintiff's site manager, Mr Burton, was responsible and obliged to undertake an assessment in order to ascertain whether or not the low-bed that was provided by the plaintiff was the correct one to move the plaintiff's crusher. The plaintiff's crusher was damaged as a result of the sole negligence of Mr Burton who failed to ensure that the horse and low-bed were suitable to convey the crusher and he caused the plaintiff's crusher with a gross weight of 45 tons to be loaded onto the defendant's low-bed with a carrying capacity of only 30 tons. No negligence on the part of the defendant or that of its driver has been proved. Mr Makuwa merely carried out his instructions. He did not participate in the loading of the

plaintiff's crusher. The damage occurred immediately on commencement of the conveyance due to the fact that the low-bed was not capable of carrying the weight of the plaintiff's crusher. Mr Burton conceded that Mr Makuwa pulled away with the horse and low-bed in a normal manner.

[29] In the result the plaintiff's claim and alternative claim are dismissed with costs.

P.A. MEYER
JUDGE OF THE HIGH COURT

12 February 2013