

NOT REPORTABLE

IN HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, DURBAN

CASE NO: 13897/2010

In the matter between:

ENGEN PETROLEUM LIMITED

Plaintiff

and

MYKATRADE 160 CC t/a STRATA LOGISTICS

First Defendant

KHAZAMULA SAMUEL MOKATSI

Second Defendant

JUDGMENT

GORVEN J

[1] A collision occurred on the westbound carriageway of the N3 between Durban and Pietermaritzburg near the Marianhill Toll Plaza on 20 April 2010. As a consequence, the Plaintiff's truck tractor and tanker trailer (the rig) caught alight, spilled its petroleum load which also caught alight and which ran into a storm water drain on the side of the freeway and down the hillside into Giba Gorge. It is common cause that the truck tractor and the tanker trailer were damaged to the point where they had no

residual value. The entire load of petroleum was lost. The load caused damage requiring it to be cleaned up in an environmentally responsible fashion. It is common cause that the plaintiff was obliged to incur the costs of such a clean-up and that this gave rise to damages recoverable from the defendant. It is for the damages arising from this collision that the plaintiff sues.

[2] At the time the matter came to trial, these costs can be summarised as follows:

a.	Loss of truck tractor (VAT incl)	R386 105.00
b.	Assessor's charges for truck tractor (VAT incl)	R 4 263.60
c.	Loss of tanker trailer (VAT incl)	R524 331.60
d.	Assessor's charges for tanker trailer (VATincl)	R 2 109.00
e.	Towing and like charges (VAT incl)	R 21 694.43
f.	Total clean-up costs	R478 490.64
g.	Total clean-up assessment charges	R207 265.04
h.	Local authority's charges for fire services	R 38 720.00
i.	Loss of load	<u>R158 034.84</u>
	TOTAL (VAT excl)	<u>R1 705 759.20</u>

[3] The defendants accepted that they are jointly and severally liable for these damages but disputed aspects of the quantum claimed. The two main heads disputed were the pre-collision value of the truck tractor and the tanker trailer and the reasonableness of the costs incurred by the

plaintiff in cleaning up the spill. It was agreed that there was no residual value in either the truck tractor or the tanker trailer. Items a, c, f and g were thus in dispute. All the other items were agreed.

[4] The plaintiff called a number of witnesses regarding the clean-up operation. Mr Boyce was, at the time, an employee of EnviroServ Waste Management (Pty) Ltd (EnviroServ). It was accepted that he is an expert in the field. He gave evidence that this company was involved in the clean-up operation at the instance of the plaintiff and that he oversaw it. The operation took from 20 April 2010 to 30 April 2010, working each of those days. It was an extremely serious operation and required immediate response so as to prevent more serious contamination, in particular of the stream at the bottom of Giba Gorge and the dam into which it ran. This is because the areas are steep and the petroleum, if not mopped up, would penetrate the soil and, if it had reached that far, could have contaminated the clay below. It might also have leached out of the soil at a lower point and contaminated the wetland. The necessity of the work which was undertaken was never challenged. The only challenge launched was to the reasonableness of the rates charged to the plaintiff.

[5] His evidence was that EnviroServ had a contractual relationship with the plaintiff with pre-agreed rates for a year at a time. These were

lower rates than were charged by EnviroServ to other entities due to the ongoing relationship. No other companies had the resources to do the clean-up. He was cross examined as to the rates of two competitors, Hazclean and Drizit. One of the plaintiff's other expert witnesses, Mr Pfothenhauer, had requested these two entities to provide their rates as at 2010 but they had only provided rates as at August 2013. This witness produced a table which reflected the April 2010 rates of EnviroServ and the 2013 rates of the other two entities. As regards the hourly labour rates, a Hazmat technician was charged out by EnviroServ at R200 for both normal time and overtime, by Hazclean at R300 for normal time and R 450 for overtime and by Drizit at R245 for normal time and R355 for overtime. A Hazmat responder was charged out by EnviroServ at R153 for normal time and overtime, by Hazclean at R175 for normal time and R260 for overtime and by Drizit at R135 for normal time and R175 for overtime. Finally for Spill assistants, EnviroServ charged R55 for both normal and overtime, Hazclean R55 for normal time and R85 for overtime and Drizit R44.90 for normal time and R54.90 for overtime. When asked to comment, Mr Boyce indicated that he was aware of the rates of Drizit and that the figures given for Drizit for 2013 were not correct. He stated that the rates of EnviroServ, especially as charged to the plaintiff for the work done in the present matter, were competitive and reasonable. He also indicated that EnviroServ did not differentiate between normal and overtime. EnviroServ was the

only entity large enough to conduct a clean-up of this magnitude. None of this evidence was challenged. The person who had recorded all the work done was also called but not subjected to any challenge on that evidence. It is common cause that, between 20 and 30 April, there were two weekend days and a public holiday where EnviroServ worked.

[6] Mr Pfothner gave evidence that the company for which he worked, Kantey and Templar, was contracted by the plaintiff to conduct a contamination assessment. Various reports were prepared. His visits to the site coincided to an extent with those of EnviroServ and his final assessment, conducted in 2013, showed that, apart from one aspect, the contamination levels were within the norms accepted. He also testified as to his survey of EnviroServ's costs compared to those of Hazclean and Drizit as mentioned above. He had no independent knowledge of the various costs but had to rely on what was supplied. His opinion was that the amounts claimed by EnviroServ were reasonable in the circumstances. Since his evidence was based on figures supplied by the other entities, it is based on hearsay. The figures were contradicted by the direct evidence of Mr Boyce who, as mentioned above, claimed personal knowledge of those of Drizit and who was not challenged. Where there is a contradiction between them as to the figures, accordingly, the evidence of Mr Boyce must be preferred.

[7] In argument the defendants attacked the reasonableness of the charges. However, in the light of the unchallenged and un-controverted evidence of Mr Boyce, this attack must fail. I am satisfied that Mr Boyce was aware of comparative pricing, now works for a competitor of EnviroServ and accept his evidence concerning the reasonableness of the charges and the unique qualification of EnviroServ to do the work.

[8] Another aspect in dispute was whether or not the amounts charged by Kantey and Templer were reasonable. A further expert, one Ms Erasmus, was called in this regard. In her evidence, but not in her expert summary, she referred to comparative charges demonstrating that these were reasonable. The only cross examination was directed at her failure to have referred to comparative charges in her expert summary and report. The evidence was acceptable and credible and the plaintiff discharged the onus to prove that the charges of Kantey and Templer were in fact reasonable. As was the case with the clean-up costs themselves, no issue was made as to the necessity of the work done by Kantey and Templer. This was an appropriate concession.

[9] The other major issue was the loss sustained as a consequence of the damage to the truck tractor and the tanker trailer. An expert witness, Mr Botha, was called concerning the pre-collision value of the truck

tractor. It had been agreed between the parties that it had no residual value. He obtained the pre-collision value of the vehicle by consulting the Mead and McGrouther guide. This guide, he described as being universally accepted. The guide uses prices supplied to it by all the dealers of actual sales, both to the trade and to the public. The former are tabulated as trade values and the latter as retail values. The only attack launched on his evidence arose from a notation on the guide indicating that it may be necessary to adjust the value of the vehicle depending on condition and distance travelled. He indicated that the notation at the top of that page did not relate to heavy vehicles as regards distance travelled. It did relate to the condition of a vehicle which might, in a minor way, lead to an adjustment. He accepted that he was not aware of the pre-collision condition of the vehicle and was not able to establish that since it has been completely burnt out. He had not looked at the maintenance records and was unaware as to whether or not the vehicle had been in a prior collision nor had he seen photographs of the vehicle prior to the collision. He vouched, however, for the accuracy of the guide from his personal experience saying that it is as accurate as one can get. He gave evidence concerning the pre-collision value of the additional items fitted to the rig. These comprised a tracking device, a tachometer, three fire extinguishers and a device which the law required fitted for vehicles carrying dangerous substances. He

could, of course, not testify as to whether these items were in good working order because they were destroyed in the fire.

[10] The driver of the vehicle was called in evidence. He indicated that the policy of the plaintiff was a rigorous one to ensure that vehicles remained in excellent condition both as regards their mechanical state and their appearance. He had been allocated to the truck tractor and the tanker trailer for the past five or six years and had followed the guidelines whereby a check was done prior to leaving the depot for any issues which might arise and a checklist completed. If anything required repair, this was taken to the workshop of the plaintiff if it was a minor repair and to the manufacturer if it was a major repair. The truck tractor and the tanker trailer were both serviced regularly and all procedures followed so that repairs were done timeously if necessary. The truck tractor and the tanker trailer were both in very good condition prior to the collision. As regards the extras whose pre-collision value was testified to by Mr Botha, each of them was in good working order.

[11] Another expert witness, Mr Money, gave evidence as to the post collision value of the tanker trailer and that this had been agreed between himself and the defendant's expert, Mr Hamilton. In the end, his evidence was not contested as to the pre-collision value of the tanker trailer,

premised as it was on this having been in good working order as was testified to by the driver.

[12] In this case, the liability to compensate the plaintiff for damage sustained as a consequence of the collision was conceded. In delictual terms, these damages amount to the patrimonial loss suffered by a plaintiff as a consequence of the wrongful act. A plaintiff is obliged to allege and prove the quantum of damages suffered.¹ Even if a defendant admits liability in a lesser amount, it need not particularise the admission and nor does that admission attract any onus.² The approach of the courts to the quantum of damages is also clear. The plaintiff must produce all the evidence that it can reasonably produce to enable the Court to assess the quantum of damage.³ If a plaintiff has done this, the court is bound to award damages, even if the award amounts to little more than an estimate.⁴ If the plaintiff fails to do so, the court must grant absolution from the instance.⁵ This is because, as explained in *Mkwanazi* by van Winsen JA, if evidence is available but was not led and a court is obliged to make the best estimate, the attempt of the court might afterwards be shown not to accord with the facts.⁶ Not only must all reasonably available evidence be

¹*Jowell v Bramwell-Jones* 2000 (3) SA 274 (SCA) para 22.

²*Turners Asbestos Products (Pty) Ltd v G Straw & Son (Pvt) Ltd* 1974 (3) SA 286 (R).

³*Eso Standard SA (Pty) Ltd v Katz* 1981 (1) SA 964 (A) at 970H.

⁴*Hersman v Shapiro & Co* 1926 TPD 367 at 379.

⁵*Mkwanazi v Van der Merwe & another* 1970 (1) SA 609 (A) at 632B-C.

⁶*Ibid.*

led but, where costs are involved in calculating damages, they must be both necessarily incurred and reasonable.

[13] In the result I am satisfied that the plaintiff discharged the onus as regards all of the disputed items.

[14] The plaintiff submitted that the various heads of damages had been sufficiently quantified at dates where demand was made as to amounts finally arrived at. This was not contested by the defendants and the order takes into account interest running on the amounts from those appropriate dates.

[15] The only other issue dealt with in argument was the question of costs. The first issue in this regard is whether or not the qualifying fees of Mr Glynn Millard should be allowed. He had been employed to give an expert opinion as to the value of the load carried in the tanker trailer. The defendants submitted that this was unnecessary since the value could have been obtained by way of referring to records in the possession of the plaintiff. The plaintiff submitted, however, that if it had relied on its own internal records, these would probably have been attacked as not being a reasonable value for the load. There is considerable force in this submission of the plaintiff. There is no doubt that the defendants may well

have adopted that approach. It is appropriate, accordingly, that these qualifying fees be allowed.

[16] The second aspect on the question of costs related to the scale on which the defendants should pay costs. The plaintiff submitted that the approach of the defendants had been unnecessarily obstructive and they should be visited with a punitive costs order on the scale as between attorney and own client. It is so that a number of pre-trial conferences were held between the parties and two were held, pursuant to the provisions of Rule 37(8) of the Uniform Rules of Court before me in Chambers. The defendants expressed their attitude that the plaintiff was put to the proof of the quantum of damages and that, although the defendants did not intend to call any witnesses, they wished to exercise their right to cross examine the witnesses of the plaintiff. In to the authority of *Ward v Steenberg*⁷ where Ramsbottom J said the following:

‘If there is no evidence that what was charged or what was paid was reasonable, then there is no *prima facie* proof of that element in the case. The fact that there is no cross-examination on the point does not supply what is lacking; there is no need to cross examine on a point on which no evidence has been given, and in a case like this to do so would be bad advocacy.’

The plaintiff, however, submitted that the defendants had, themselves, instructed experts on the issue as to the quantum of the plaintiff’s claimed

⁷1951 (1) SA 395 (T) at 404A-B.

damages. Neither of the experts so instructed had challenged the reasonableness of the charges under the disputed heads. The plaintiff, accordingly, submitted that there was no genuine dispute concerning reasonableness which could not have been easily resolved. Accordingly, it was not necessary for the defendants to go to trial on these issues.

[17] While the plaintiff is correct that the defendants had no need to go to trial on the issues in question, it is most certainly the right of a party to require their opponent to prove their case. There is no onus on an opponent to reach agreement. Of course, if an opponent unreasonably opposes a matter, a court has a broad discretion to express its displeasure in the costs order given. This is recognised in Rule 37 (9)(a)(ii) which obliges a court to consider whether it is appropriate to make a special order as to costs against a party or his attorney because that party or attorney failed to a material degree to promote the effective disposal of the litigation. In this instance, that is precisely the situation. The defendants had at the disposal experts advising them on the disputed heads of damages. In the end, there are experts agreed with those of the plaintiff to the extent that the defendant did not deem it necessary to lead their evidence. The joint minute indicated agreement on every point. It does not assist the defendants to say that they did not request the experts to advise them on the issue of reasonableness. That is always an issue as regards the question

of quantum. In my view, accordingly, and in the exercise of my broad discretion, I find it appropriate that the defendants should be visited with the displeasure of this court for failing to promote the effective disposal of the litigation despite requests at pre-trial conferences by the plaintiff in that regard.

[18] In the result, the following order is granted:

The 1st and 2nd defendants are ordered to pay the following jointly and severally, the one paying the other to be absolved:

1. Payment in the sum of R1 705 759.20;
2. Interest at the rate of 15.5% per annum:
 - 2.1 on the sum of R1 344 588.40 from 26 July 2010 to date of payment;
 - 2.2 on the sum of R126 571.60 from 4 July 2011 to date of payment;
 - 2.3 on the sum of R234599.28 from 22 October 2013 to date of payment.
3. Payment of the plaintiff's costs of suit on the scale as between attorney and client, which costs shall include the qualifying fees and travelling expenses, where applicable, of the following expert witnesses:

- 3.1 Mr Aldo Botha;
- 3.2 Mr Reg Money;
- 3.3 Mr Christopher Boyce;
- 3.4 Mr Torin Pfotenhauer;
- 3.5 Ms Diane Erasmus;
- 3.6 Mr Glynn Millard.

DATE OF HEARING: 30, 31 October and 1 November 2013
DATE OF JUDGMENT: 1 November 2013
FOR THE PLAINTIFF: TJ Nel instructed by HERALD GIE
ATTORNEYS, locally represented by
BEALL, CHAPLIN & HATHORN.
FOR THE DEFENDANTS: PJ Wallis instructed by NORTON ROSE
FULBRIGHT SOUTH AFRICA.