IN THE KWAZULU-NATAL HIGH COURT, PIETERMARITZBURG
REPUBLIC OF SOUTH AFRICA

APPEAL CASE NO.: 908/2010
KZN HC - DURBAN CASE NO.: 369/2002

In the matter between:

REVERTEX CHEMICALS (PTY) LIMITED Appellant

and

CLIMAX LIFT HIRE (PTY) LIMITED Respondent

J U D G M E N T

KOEN J:

INTRODUCTION:

[1] This is an appeal against a judgment by Sishi J granting judgment in favour of the respondent (the plaintiff in the court *a quo)* for payment of the sum of R229 329.61, interest thereon at the rate of 15,5 % per annum calculated from 22 January 2002, and the costs of the action. Leave to appeal to this court was granted by the Supreme Court of Appeal.

[2] The parties shall be referred to as in the court *a quo*.

[3] The plaintiff instituted action against the defendant on a number of claims. Save for the claim for contractual damages in the sum of R229 329.61 forming the subject of this appeal, the remaining claims were all either abandoned or dismissed.

BACKGROUND:

[4] On the 6th of November 1997 the plaintiff and defendant concluded a written agreement in respect of 'equipment hire' in terms whereof the defendant would hire five Clark fork lifts at a monthly rental of R2 784.00 per unit per month together with value added tax for a period of sixty months terminating in October 2002.

[5] Clause 5.1 of the agreement provides:

> 'In the event of unsatisfactory or inefficient levels of service being provided, the customer may tender a 30 (thirty) day notice of intent to cancel this agreement. Climax shall be obliged to remove all of its contract Equipment at the conclusion of the said notice period without financial loss to the Customer.'

[6] During 2000 the defendant complained of what it considered to be poor levels of service. A meeting was held during October 2000 in an attempt to resolve various issues. The meeting ended when Mr Hogno of the plaintiff stormed out of the meeting.

[7] The defendant thereafter continued to use the fork lifts. On the 29th of March 2001 the defendant sent a cancellation notice to the plaintiff giving notice that the agreement would come to an end on 30 April 2001.

[8] In May 2001 the plaintiff retrieved the five fork lifts from the defendant.

[9] Payment was made by the defendant in full for the 42 months ending 30 April 2001.

THE PLAINTIFF'S CLAIM:

[10] The plaintiff treated the defendant's letter of cancellation as a repudiation which it averred it had accepted, alternatively accepted at the time

of the issue of summons. The plaintiff's claim is accordingly one for damages arising from the defendant's alleged breach of the agreement.

[11] The plaintiff's damages are calculated as set forth in Annexure B to the summons. It comprises lost rental in respect of the five fork lifts for the period from May 2001 to the date the contract would have extended, namely October 2002 (save in respect of fork lift number 310 which was sold and in respect of which rental is only claimed to March 2002), from which is deducted the total 'monthly maintenance rate', representing the maintenance costs that would have been incurred in respect of the use of the fork lifts. The loss of rental claimed consists of a uniform claim of R3 420.11 per month in respect of each of the five units until November 2001 and thereafter R3 591.12 from December 2001 to October 2002 (save in respect of unit number 310 where the amount of R3 591.12 is only claimed from December 2001 to March 2002). The monthly maintenance rate claimed in respect of each machine is a flat rate of R756.00 per month for the entire period from May 2001 to October 2002.[1]

<u>THE ISSUES</u>:

[12] The issues arising for consideration, both in the court *a quo* and on appeal are:

(a) Whether the defendant's cancellation of the contract by invoking the provisions of clause 5.1 thereof, was proper or whether such cancellation amounted to a repudiation of the agreement; and if so

(b) Whether the plaintiff suffered damages in the amount determined.

<u>WHAT IS MEANT BY 'UNSATISFACTORY OR INEFFICIENT LEVELS OF SERVICE</u>':

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1 In terms of the agreement the monthly rental was 'subject to a 5% (five per centum) per annum escalation factor, same to be negotiated at the conclusion of each 12 month contract period in the event of costs escalating beyond that point'.

[13] The agreement is silent on what is meant by 'unsatisfactory or inefficient levels of service.' The enquiry is an important one as it constitutes the threshold requirement upon which the defendant, as customer, may tender a notice of intent to cancel.

[14] The agreement was one proposed and drafted by the plaintiff. In the event of any ambiguity the agreement must be interpreted against the interests of the plaintiff, in accordance with the *contra proferentem* rule, as the plaintiff had it within its powers to spell out exactly what it meant by 'unsatisfactory or inefficient levels of service being provided.'

[15] Provided the evidence established 'unsatisfactory or inefficient levels of service' being provided, the defendant would be entitled to cancel the agreement as the materiality of the breach is irrelevant where the right to cancel is provided for in terms of a *lex commissoria*[2].

[16] The enquiry as to what is meant by 'unsatisfactory or inefficient levels of service' must be judged objectively. The right to cancel cannot simply accrue to the defendant should the defendant subjectively and unreasonably adopt the view that the service it received was unsatisfactory or inefficient.

[17] Counsel appeared to approach the matter on the basis that the defendant has a discretion to decide whether service levels are unsatisfactory on inefficient or not, but that such discretion had to be exercised reasonably *arbitrium boni viri* and that the decision of the defendant must have been 'a reasonable decision'[3]

[18] The defendant clearly had an election if the services provided were unsatisfactory or inefficient to continue with such services or to cancel. But the words 'unsatisfactory or inefficient levels' must be judged objectively.

2 Oatorian Properties (Pty) Limited v Maroun 1973 (3) SA 779 (A) at 787F.
3 *Lobo Properties Pty Limited v Express Lift Co (SA) Pty Limited* 1961 (1) SA 704 C 708.

[19] In the absence of a definition of those phrases, it would seem that the words ‘unsatisfactory or inefficient levels of service being provided’ must be assessed against the standards applicable in that industry. That must necessarily be what the parties would have contemplated and is therefore implied.

<u>THE EVIDENCE</u>:

[20] The evidence of Mr Hogno for the plaintiff established that the standard service procedure would be for a mechanic to visit the fork lifts weekly for the purpose of service checks. Thereafter complete lubrication services would be carried out at approximately 200 metered hour operation intervals.

[21] Mr Hogno testified that each forklift indeed received a visit and a service from a mechanic at least once a week. The mechanics employed by the plaintiff were required to fill out service reports when they did their weekly check and when they serviced the machines. Even when there was nothing to be done on the machine they were still required to fill out a service report.

[22] An inspection of the plaintiff's own service records however shows that the five machines were not service checked weekly, leaving aside any lubrication services. Not surprisingly, and with respect correctly, the court *a quo* concluded that Mr Hogno's evidence was totally inconsistent with the plaintiff’s service record, exhibit ‘D’, insofar as the service of the machines was concerned, and that the evidence of the defendant’s expert, Mr Lott, that the five fork lifts had been badly serviced and maintained was corroborated by the plaintiff's own service records.

<u>THE FINDINGS OF THE COURT *A QUO*</u>:

[23] The court *a quo* correctly found that the argument by the plaintiff that the service levels of the fork lifts were justified by the hours used, was without

merit. The evidence showed that the fork lifts were in constant use as the factory operated 24 hours for 7 days a week, closing down only for a 2 week period in December. The complaints received by a Mr Edmunds who had become responsible for the contract on behalf of the defendant in July 2000, from the drivers of the fork lifts, were conveyed to the plaintiff. These complaints regarded lack of service, and are corroborated by the finding of the expert Mr Lott who examined the fork lifts on the 14 February 2001. Not only were Mr Lott's findings corroborated by the plaintiff's own service records, but they were also not disputed by the evidence of the plaintiff's expert, Mr Wilson.

[24] Notwithstanding the aforesaid findings, during the course of the judgment the court *a quo* seemed to have been influenced by the following considerations:

(a) Mr Lott's findings detailing complaints were never communicated to the plaintiff;

(b) It took the defendant some six weeks after receipt of Mr Lott's report which was dated the 16 February 2001 to come to the conclusion that the plaintiff's service levels were unsatisfactory or inefficient entitling the defendant to cancel the contract, which in the view of the learned Judge indicated that the defendant was in itself not confident enough that it was justified in invoking the provisions of Clause 5.1 of the contract until receipt of Mr Lott's report;

(c) Under normal circumstances the defendant would have given the plaintiff a notice to remedy the alleged breach. If the breaches of the contract were not brought to the attention of the plaintiff, the plaintiff had no way of knowing those alleged breaches. The defendant therefore could not hide behind the allegation that there was no obligation on the defendant to give the plaintiff notice to remedy the breaches. At the very least the defendant had an obligation to bring to the attention of the plaintiff those alleged breaches prior to terminating the contract.

Accordingly the court found that the cancellation of the contract was not justified and amounted to a repudiation.

DID THE DEFENDANT REPUDIATE THE AGREEMENT?

[25] I am, with respect to the learned judge in the court *a quo,* not persuaded that notification was required. What the agreement required, by necessary implication, was that the service levels throughout had to be satisfactory and efficient. That is the obligation the plaintiff attracts of its own volition, even if it may be burdensome. If the plaintiff wished to protect itself against any possible temporary lapse in service delivery, then it had it within its powers to have stipulated that prior notice would be required granting it the opportunity to remedy any alleged defect within a specified time before cancellation would be competent.

[26] Provided the service was unsatisfactory or inefficient the defendant would be entitled to cancel the agreement even if it did not give notice to remedy to the plaintiff, provided it exercised that election within a reasonable time. I do not believe that the delay from the time that the contents of Mr Lott's report became available to the defendant until it communicated its intention to terminate the agreement to the plaintiff was unreasonable.

[27] Objectively speaking, the service provided was unsatisfactory and inefficient. Accordingly, the defendant became entitled to cancel the agreement and its notice of termination did not constitute a repudiation which would found a claim for damages in favour of the plaintiff. The plaintiff's claim should accordingly have been dismissed with costs.

DID THE PLAINTIFF PROVE IT'S QUANTUM OF DAMAGES?

[28] However, even if I am wrong in my aforesaid findings, the plaintiff had not proved its damages on a balance of probabilities.

[29] Even accepting the escalation in rental, as set out in annexure B to the Particulars of Claim, to be calculated correctly in terms of the agreement, the plaintiff's calculation of its quantum viewed against the background evidence is contradictory and unsatisfactory, and does not constitute satisfactory proof of its quantum of damages on a preponderance of probabilities.

[30] A party claiming contractual damages should be placed in the position it would have been in had the contract been performed properly. The onus is on the plaintiff to adduce evidence and proof of the damages which he claims to have suffered[4] .

[31] Broadly stated, the plaintiff would in principle be entitled to the rentals it would have earned but no longer could earn due to the defendant's repudiation, less any rentals it could earn from letting out the fork lifts having now regained possession thereof during the remainder of the rental period, in order to mitigate its loss, but after deduction of the service costs that it would have had to incur in respect of the operation of the fork lifts whether they were hired by the defendant or by any third party.

[32] The defendant also submitted that a portion of the plaintiff's fixed business costs such as rental, salary, taxes, levies, and other costs would also have to be taken into account on some sort of actuarial basis to properly calculate what the plaintiff's loss of profit would be. I have serious reservations as to the inclusion of these items relating to fixed costs in a calculation of any damages. *Prima facie* they appear to me to play no role, as the fixed costs for example the salary of a receptionist would be incurred whether this agreement was adhered to or cancelled. There was also some suggestion by the defendant that any profit realized on the sale of the fork lift number 310 during or about March 2002 should operate to reduce any claim for damages the plaintiff may have. I fail to see how that could be the case

4 *S M Goldstein and Company Pty Limited v Gerber* 1979 (4) SA 930 A and *Sommer v Wilding* 1984 (3) SA 647 A.

on the facts of the present matter. The fork lift could in any event have been sold at the end of the rental period. The only benefit the plaintiff now had resulting from the breach of the agreement was that it could be sold some nine months earlier. Any financial implications arising therefrom would be too remote to affect the calculation of damages.
In view of the conclusion to which I have come, it is not necessary to deal with these novel arguments any further and I accordingly refrain from doing so.

[33] The plaintiff's claim for damages insofar as it comprises the loss of rental, reflects a uniform rental amount being claimed for the periods from May 2001 to November 2001 and then from December 2001 to October 2002. The plaintiff was asked whether the fork lifts were hired out on a regular basis after they were returned to him, to which he replied that ‘they were hired out as and when the market called for those capacity machines’. If they were hired out, then the rental that was earned, and which would mitigate the plaintiff's loss, should be taken into account. No provision whatsoever has been made for any rental thus earned.

[34] Conversely, if seemingly contrary to the plaintiff's evidence it would be suggested that the fork lifts lay largely idle and that they were hired out as and when the market called for those capacity machines, as an exception rather than the rule, then the uniform deduction throughout the period from May 2001 to October 2002 in respect of all of the machines in the sum of R756 per month, where these monthly maintenance rates would be dependent on the metered hours that the machines worked and had to be lubricated, should be nil or significantly less than the amounts claimed, or the amounts should at least vary from one fork lift to the next. The evidence suggested that the amounts allowed in respect of maintenance were based largely on an approximation and by making an allowance of maintenance of R4.20 per hour or per hour of usage. They were in fact not the actual maintenance costs in respect of the fork lifts. The actual maintenance costs should be readily available to the plaintiff.

[35] The plaintiff failed to prove its quantum of damages on a balance of

probabilities. Even if the defendant’s notice of termination amounted to a repudiation, the court *a quo* should have absolved the defendant from the instance.

ORDER:

[36] The order issued is as follows:

(a) The appeal is upheld with costs

(b) The order of the court *a quo* is set aside and substituted with an order dismissing the plaintiff's claims with costs.

KOEN J

MOKGOHLOA J

PLOOS VAN AMSTEL J

DATE OF HEARING:	**8 FEBRUARY 2012**
DATE OF JUDGMENT:	
APPELLANT'S COUNSEL:	**ADV. K C McINTOSH**
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