

/LVS
**IN THE HIGH COURT OF SOUTH AFRICA
(NORTH GAUTENG, HIGH COURT)**

DATE: 25 MARCH 2009
CASE NO: 3523/2006
Not reportable

In the matter between:

SANDBERG TRANSPORT BK t/a SANDBERG PLAINTIFF

vs.

**AFRICAN TRUCK ACCIDENT REPAIRS (EDMS) BPK t/a
HERMANS TRUCK ACCIDENT REPAIRS DEFENDANT**

JUDGMENT

BOTHA J:

The plaintiff, Sandberg Transport CC, trading as Sandberg (Sandberg) instituted two claims against the defendant, African Truck Accidents Repairs (Pty) Ltd trading as Herman's Truck Accident Repairs (Hermans).

Both claims relate to a Mercedes Benz diesel truck of the plaintiff that was involved in a collision.

The first claim is for an amount of R49 612.80 and it represents the reasonable cost of correcting defective repair work done by the defendant.

The second claim is for an amount of R46 377.80 and represents consequential loss sustained as a result of the fact that the vehicle could not be used after it had been repaired by the defendant.

The plaintiff alleged that the vehicle was taken to the defendant and that the defendant issued a quotation for repairing the vehicle.

Then it is alleged that the parties orally agreed on 5 August 2005 that the defendant would repair the truck; that the repairs had to be done by 18 August 2005, which date was extended to 25 August 2005; that the repairs would be done in a workmanlike manner; that the plaintiff would pay the excess payable in terms of its insurance policy; and that the insurance company would pay the balance.

It is alleged that the excess was paid on 2 September 2005 and that the vehicle was returned on that day. It is alleged that on 2 September 2005 the vehicle was in a defective condition and returned to the defendant.

It is alleged that the vehicle was returned to the plaintiff on 6 October 2005 but that on 7 October 2005 it was found that the defendant's servants had assembled the top torque rod in the wrong position with the result that the front differential tilted too much, causing vibration and the leaking of oil.

It is alleged that this constituted a breach of contract and that the defendant was aware of the fact that the plaintiff needed the truck to transport sand; that it was one of three trucks of that size; and that if not delivered in time, the plaintiff would suffer loss by having to use smaller trucks.

The defendant admitted that:

- (a) it was requested to repair the truck;
- (b) that the insurance company and the plaintiff was given a quotation;
- (c) that at the end of July 2005 the plaintiff and the defendant agreed that the truck would be repaired according to the quotation;
- (d) that the repairs would take two to three weeks subject to final approval by the insurer;
- (e) that the plaintiff would pay the excess and the insurer the balance;
- (f) that the repairs had to be effected in a workmanlike manner.

It is admitted that the vehicle was returned on 2 September 2005 after repairs had been effected and that it was returned to the defendant on 7 September 2005 with minor defects that were eliminated. It is admitted that the vehicle was returned on 4 October 2005.

It is alleged that the vehicle was repaired in accordance with the plaintiff's mandate as approved by the insurer.

In the alternative it is alleged that the defects were not related to the collision and were related to the general maintenance of the truck.

In general the allegations not admitted were denied.

At the pre-trial conference it was agreed that if the top torque rod was fitted in the wrong position, the front differential would tilt too much, causing the yokes of the propshaft to hit against each other and extending the gear propshaft to its maximum. The propshaft would run at an unacceptable angle, damaging the oil seals and causing oil leakage. The gearbox output bearing and the differential bearing could also be damaged.

The plaintiff called its member, Mr Schlesinger, Mr S Candasamy, its workshop manager, Mr Willers, Mr M.F du Toit and Mr J.P Prinsloo.

Mr Schlesinger testified that he had a telephone conversation with Mr André Botha of the defendant on 5 August 2005. He discussed the quotation, A1-5. They agreed on a date of completion namely 18 August 2005. On 17 August 2005 he was telephoned and told that the subcontractor working on the differential would not be ready. He was asked to extend the date of completion to 25 August 2005. He agreed.

On 23 August 2005 he happened to visit the defendant and he was told that the vehicle would be ready on 25 August 2005.

On 25 August 2005 he was told that the vehicle was not ready. He asked that the defendant deliver it in Louis Trichardt.

On 2 September 2005 he was told that the vehicle was ready. During the day he was told that it had broken down near Potgietersrus owing to an oil leak on the differential. At about midnight the vehicle was delivered.

On Monday 5 September 2005 he inspected the vehicle and found serious defects. They are tabulated in his letter dated 7 September 2005 (A6-7).

The vehicle was returned to the defendant.

On 27 September 2005 he was called and asked to inspect the vehicle at the defendant's premises. He went there and found certain defects.

On 12 September 2005 the defendant sent a letter (A8- 9) in which the defendant attributed the problems with the repairs to the amount of modifications on the vehicle. He never effected modifications on the vehicle. It was a 1995 model that he bought in 2002.

On 10 October 2005 the defendant sent another letter in which it was alleged that the repairs were complicated by poor maintenance. See A10-11.

According to the letter the truck was slipping out of top gear, which never was a problem with the vehicle.

On 4 October 2005 the vehicle was returned to the plaintiff. On 5 October 2005 it was inspected by his workshop manager, Mr Willers. He reported that it was vibrating. He telephoned one Tony at the defendant. He said that he would send a technician.

Mr Willers said that it appeared that the torque rod had been installed incorrectly. He referred to two photographs on A25. He telephoned Tony again and told him that he would also get Mr Candasamy of Mototech in Louis Trichardt to look at the vehicle. Mr Candasamy came to look at the vehicle and also Mr Prinsloo of Specialist Propshaft Services Pietersburg CC (SPSP).

In view of what Mr Candasamy told him about a conversation between him and Tony, he gave Mr Candasamy instructions to effect repairs in terms of a quotation, A27. The amount of the quotation was R31 464.00. He also had to pay SPSP R18 148.80 for subcontracted work. See A15.

The two amounts make up claim 1.

He explained how he calculated his claim for consequential loss. See A34. In essence it was based on the fact that he had to use more trucks with a capacity of 5,3 m³ and 10m³ to do work that could have been done by the vehicle in question, that had a capacity of 20m³.

He was asked about the discount of 10% he allowed on his second claim. That was allowed because not all the loads collected at Lombard's

Mine were offloaded at his depot or stockpile. Some loads were directly offloaded at the customers.

He had eleven trucks. Four of them were 20m³ trucks.

He was referred to the inscription "Stockpile" on a number of his invoices. He conceded that he could not say how many loads were offloaded at the stockpile. It was the exception that loads were taken directly to a customer.

He had a fixed price for material on which he added a transport rate.

He could not say how many clients were involved in the invoices A38-63 (some 50 invoices).

It was put to him that he could not with certainty say that his consequential damage amounted to R46 000.00. He conceded that.

He was referred to the defendant by the person from whom he bought the vehicle.

He argued that the insurance company, Santam, gave him the go-ahead to proceed with the repairs. The broker gave him the right to choose between three repairers.

It was put to him that there was an agreement between Santam and the defendant. He agreed.

The distance between Louis Trichardt and the defendant's premises was 450 kilometres.

The two differentials on the vehicle were similar. They were marked HSL7, which denoted size.

The photographs on A28 were taken by a Mr Fourie on 5 October 2005. His vehicles were regularly serviced at 10 000 kilometres. He kept log books. He did not have them at court.

When he bought the vehicle it had done 350 000 kilometres. With him it did about 60 000 kilometres a year.

He decided to send the vehicle to Mototech because the defendant had had enough opportunity to repair it.

He denied that the problems with the vehicle were caused by poor maintenance.

The defendant did not know how many trucks he had and what their capacities were.

He accepted that the work could only commence after the approval of the assessor.

He conceded that the defendant might have been unaware that he would suffer a loss of income.

In re-examination he pointed out that the quotation was given to him and that he had to sign the discharge form.

Mr Candasamy testified that he was a qualified diesel mechanic and gave particulars of his expertise.

When he inspected the truck he found excessive play on the prop shaft. The angle of the differential was incorrect. He found that the front torque rod had been incorrectly fitted. He explained that with reference to the photographs on A28. The shiny portions on photograph 2 showed how much the prop shaft had come out.

Photograph 66 shows a correct fitting.

He referred to the two bolts that were painted white. He was told by the defendant's expert that they were painted white so as not to be overlooked.

In view of the fact that the chassis were sprayed he inferred that they were marked after the chassis was sprayed. That means that the torque rod was fitted after the painting.

If the torque rod was fitted incorrectly it changed the angle of the differential and caused a vibration. One would be able to drive the truck without a trailer. Eventually it would lead to gear and bearing failure.

In that condition one could drive the truck 1000-1500 kilometres depending on whether there was a trailer.

After he received the vehicle, he telephoned Tony at the defendant. Tony said he should only replace the seals. He told Mr Schlesinger, who then instructed him to repair the vehicle.

His quotation represented a fair price. He had to buy components in Johannesburg. His labour charge was three to four times cheaper than that of Mercedes Benz.

If one had to fit a dead axle it was easier to gain access by moving the front differential forward and moving the rear differential backward.

It was possible to drop down the dead axle by releasing the rear springs.

One had to remove the top torque rod to remove the dead axle. That was the way he would do it. He conceded, however, that it was possible to remove the dead axle without touching the top torque rod.

He could not remember what his mark-up at the time was. It ranged between 30% and 35%.

He denied that the plaintiff's vehicles were poorly maintained. Poor servicing could not have caused the defects.

His rates were comparable to the rates charged in rural areas.

Mr M.J Willers testified that in 2005 he was the plaintiff's workshop manager.

He initially reported the defective repairs to Mr Schlesinger.

When the vehicle was returned he took it on a 5 kilometre test drive. He found that it vibrated.

The vehicle gave no trouble before the collision. He inspected all the plaintiff's vehicles once a week.

Mr M.F du Toit is a qualified motor mechanic and fitter who worked for Specialist Propshaft Services Pietersburg CC (SPSP).

He was the author of the invoice, A15. He had to rebuild the whole propshaft. He had to replace the sliding assembly, the stub yoke and the universals. He described the price as market related. His firm had fixed prices at all its branches. The propshaft was delivered by Mr Prinsloo, their workshop manager.

The problem with the propshaft was that the components were working at wrong angles. They were working against each other.

The particular propshaft had been at their firm earlier. Then it was only lubricated. That service was a few months earlier. It was a case of regular service. There was nothing out of the order.

Mr J.P Prinsloo was the branch manager of SPSP in September-October 2005.

Mr Schlesinger of Sandberg telephoned him about vibration in the truck.

He went to Louis Trichardt. He could see that the angle of the propshaft was incorrect. The torque rod had been fitted incorrectly.

With reference to photograph 2 on A28 he explained that the propshaft pulled out too far.

He told Mr Schlesinger that it had to be repaired. He fetched the propshaft from Mototech. Mr du Toit repaired it. It was returned to Mototech because the truck was there.

If the torque rod is fitted incorrectly the angle of the differential is wrong and the universal joints hit against each other. The sliding component of the differential pulls out too far. All this causes vibration.

It will not be detected immediately. The vibration can disappear at a certain speed and return at a different speed. One can drive 50-2000 kilometres with such a condition.

When he saw the truck there was an oil leak under the gear box and under the front differential.

He did not drive the truck. He was told that there was a vibration. One would not notice vibration by merely driving to Sandberg's gate.

When he saw the truck the torque rod was incorrectly fitted. The front differential was tilted.

They worked on the propshaft of the truck the previous December. He then collected the propshaft. He did not install it. It was done by Sandberg.

He saw the truck when he collected the propshaft. The trucks number was not on the invoice, but on the job card.

That concluded the evidence on behalf of the plaintiff.

The defendant's first witness was Mr P.M Widlake, the diesel mechanic, who worked on the truck.

At the defendant he did a lot of work on wheel alignment and chassis straightening.

He removed the rear differential and the dead axle of the plaintiff's truck. He removed the dead axle by lifting the truck up on a fork lift and removing the nuts and bolts, thereby causing the axle to drop out. He did this because it was on the job card. He did not work on the front differential because it was not on the job card.

He was referred to the two white dots visible on photograph 1 on A28. They were raised at a meeting of experts. He had no reason to make the white marks.

He cannot remember what was said at the meeting of experts. He agreed that the truck was sprayed.

He explained a series of photographs in the defendant's bundle marked B. They are B21-28 and relate to parts of a truck similar to the plaintiff's truck.

B23 shows the top rear torque rod correctly fitted. B24 shows the bolts that are removed when the dead axle has to be removed. B26 shows the front top torque rod correctly fitted. On A28 it is incorrectly fitted. B27 shows the dead axle. B29 shows it from underneath.

The shiny ring on the propshaft shown on photograph 2 of A2 shows that the differential was at an angle. The propshaft appears to have been fairly old.

He did not know whether it was easier to gain access to the dead axle by taking off the top torque rod.

After the repairs on the truck, it went to the paint shop. Then it was inspected by a Mr Liebenberg.

He did not inspect the top torque rod. He would not have noticed it. He agreed that he was not the only person who worked on the truck. He did not know who else worked on it.

He agreed that after the initial repairs it was found that the chassis was not straight and that the dead axle was bent.

He agreed that he did not check the truck properly and that the workmanship was not up to standard. He did not check the dead axle the first time.

He agreed with reference to photograph 2 on A2, that one could not say that there was a lack of maintenance. He agreed that the broad shining ring was the result of the torque rod having been fitted incorrectly.

He agreed that bolts are normally marked before spraying is done. Therefore the white spots must have been painted on after the spraying.

The damage on the shiny part must also have been done after the spraying.

The truck was sprayed before it left the defendant's premises the first time.

He did not know that the truck stopped at Potgietersrus. He did not know that it was slipping out of top gear.

He agreed that if there was an oil leak there could have been a problem with the differential.

He did not check the truck out.

He agreed that the two white dots and the shiny ring was the result of work done on the front torque rod either at the defendant or at the plaintiff.

He accepted that the plaintiff had no reason to work on the truck. The defendant had the opportunity to work on the truck. He did not know whether anyone else worked on the front torque rod.

The dead axle was replaced with another one. He did not see any modifications on the truck. If there was a vibration it would be at the back of the truck but one would still feel it.

There was nothing on the job card necessitating the removal of the front torque rod.

Mr Tony Thompson had been at the defendant since 1988.

The Monday after the truck was returned the first time, Mr Schlesinger telephoned him and said that he was not happy. He sent his representative, Mr Botha, who agreed to take the truck back.

They picked the truck up and removed the dead axle. The assessor, Mr O'Donovan, agreed that it could be replaced.

Mr O'Donovan authorized the repairs in the first place. After the dead axle had been replaced the defendant's driver, Mr Mokwela, drove the truck back to Louis Trichardt.

The next day Mr Schlesinger telephoned to say that there was a vibration. He said that he could bring the truck back. Mr Schlesinger asked whether someone in Louis Trichardt could look at the truck. He agreed. Then Mr Candasamy telephoned him.

He was referred to his letter dated 10 October 2005 in which he said that the repair work was complicated by poor maintenance. He explained that it was an old truck.

Mr Botha said that the chassis was bent. When Mr Candasamy telephoned him he said that he could change the oil seals. Anything more would require the approval of the assessor.

His allegation in his letter that the repairs were complicated by poor maintenance was based on information from the defendant's workshop manager, Mr Willis.

The same applied to his reference to modifications in his earlier letter. He accepted that the client was the owner of the truck, that he had to be satisfied with the repairs and that he had to sign the release forms. The

defendant had a contract with Santam. He agreed that Santam would not sue the defendant if the work was not done properly.

He agreed that he knew that the truck stopped at Potgietersrus and that it was slipping out of gear. It was serious but it was not part of the quotation.

He agreed that when the truck was returned work had to be done that did not form part of the quotation.

He knew that if the truck stood still there would be damage.

He offered to take the truck back. It was the client's decision whether to accept it. He thought that it was reasonable that the defendant be given a choice to rectify the complaint.

He was sure that his letter had been sent before Mr Candasamy was involved.

When it was put to him that he had no personal knowledge of who worked on the truck he answered that he worked there. The people involved were painters, strippers, assemblers, panel beaters and mechanics, all in all about ten persons.

The truck was not in the best condition. The interior of the cabin was shoddy.

Mr P Mokwela testified that he drove the truck back to Louis Trichardt. He experienced no problems. When asked about vibrations he answered that it was an old truck. If there was a problem he would have reported it to his office. He once received a call from the office to the effect that he was driving too fast. He expected such an old truck to be rusty and slower. It was not rattling or shaky. He was supposed to travel at 80 kilometres per hour, but he did exceed that speed.

That concluded the evidence on behalf of the defendant.

Although Mr Riley, who appeared for the defendant, elicited some concessions from the plaintiff's witnesses to the effect that the defendant's contract was with Santam, it is clear on the evidence that there was also an agreement between the plaintiff and the defendant. The fact that there was an agreement between the defendant and Santam did not exclude the possibility of the plaintiff and the defendant concluding an agreement or agreements relating to such issues as the time for the completion of the repairs and the correction of defective work. That is exactly what happened in this case. In fact it was common cause on the pleadings. See paragraph 7 of the plea.

On the facts it was common cause that after the defendant had effected repairs on the plaintiff's truck the truck had a vibration that was caused by the incorrect fitting of the top torque rod. It must be accepted that the vibration was the symptom of parts that were functioning out of kilter and causing damage. It must also be accepted that the repairs effected by Mototech (as partly subcontracted to SPSP) was necessary in order to remove the damage caused by the incorrect fitting of the top torque rod.

The question is who was responsible for the incorrect fitting of the top torque rod.

Mr Wessels, who appeared for the plaintiff, clearly demonstrated in his cross-examination of Mr Widlake, that there were only two possibilities: either it was done at the premises of the defendant or at the premises of the plaintiff. Mr Widlake conceded as much.

Mr Widlake denied that he touched the top torque rod and explained that he did not need to do that in order to remove the dead axle. His evidence in this regard was not challenged.

That is, however, not the end of the matter. The fact is that somebody did tamper with the top torque rod. The fact that the bolts were painted white suggests that, because that is an accepted procedure to ensure that the tightening of a bolt is not forgotten. It is clear that that must have been done after the chassis had been sprayed.

It is clear that Mr Widlake was not the only person who worked on the truck. About 10 persons were involved including, significantly strippers and assemblers.

It is clear that the vibration was detected very soon after the truck had been returned to the plaintiff's premises for the second time. The cause of the vibration, namely the incorrect fitting of the top torque rod, was also identified very soon.

There was simply no reason or opportunity for the plaintiff to tamper with the top torque rod.

The fact that the defendant's driver, Mr Mokwela, did not find reason to complain about a vibration, is not conclusive. In the first place, when he was asked whether there had been a vibration, he answered, somewhat enigmatically, that it was an old truck. Then the evidence was that a distance of in excess of 1000 kilometres could be travelled with that condition and that the vibration could temporarily go away.

It is of some significance that Mr Candasamy's preferred route of access to the dead axle was via the torque rod. The dead axle had to be removed by the defendant.

If I consider all the evidence I find that the probabilities favour the scenario that the incorrect fitting of the torque rod was done at the premises of the defendant.

On that basis the defendant is clearly liable on claim 1.

The evidence of Mr Candasamy about the reasonableness of his price must be accepted. He could not remember what his mark-up was, but the range given by him was not excessive. He made the point that his labour rates were significantly lower than those of Mercedes Benz. Mr Prinsloo's evidence about the reasonableness of SPSP's price was not seriously challenged. It accorded with prices charged at other branches.

Mr Wessels conceded that 2.5% should be deducted from the claim on the assumption that the plaintiff could have availed itself of the cash discount offered by SPSP. That would reduce claim 1 to R49 159.08.

In respect of claim 2 I allowed an amendment in conformity with Mr Schlesinger evidence.

The evidence of Mr Schlesinger that there was an agreement in respect of the time of completion and that it was extended, was unchallenged.

Mr Riley referred to the particulars of claim, and more particularly paragraph 12 thereof, in which the following is alleged:

“When the agreement was concluded between Plaintiff and Defendant, Defendant was aware of the following facts and the agreement was entered into on the basis of these facts:

- 12.1 that Plaintiff needed this truck to transport sand;**
- 12.2 that this was one of three trucks of that size that Plaintiff had for that purposes;**
- 12.3 that should the truck not be repaired properly and timeously, Plaintiff would be unable to transport sand as is its profession and that it would have to use smaller trucks which had to drive more trips to convey the same tonnage of sand per day than the truck in question; and**
- 12.4 that it would suffer a loss of income as a result of the extra transport costs of the smaller trucks.”**

He pointed out that the defendant was not aware of the fact that the plaintiff had three (or four as the evidence was) 20m³ trucks and that the work of the damaged truck would have to be done less effectively by smaller trucks.

The fact is that Mr Thompson readily admitted that it was foreseeable that the defendant would suffer a loss its truck was not available. In this type of business it must have been obvious on any basis, that trucks of this kind were earning money and that if they were not operational, there would be a resultant loss of income. That much is alleged or implicit in paragraph 12.1 of the particulars of claim.

What the plaintiff actually claims represents less than the loss of the income of the truck. It does not allege that it lost work as a result of the non-availability of the truck. It alleges by implication that it could honour all its commitments, but only by dint of using trucks that were not as cost effective as the damaged truck. Seen in that way the loss claimed is actually less than what was foreseeable in terms of paragraph 12.1. I agree with Mr Wessels that it was not necessary that the actual manifestation of the loss should have been in the contemplation of the parties. See **BAT Rhodesia Ltd v Fawcett Security Organisation (Salisbury) Ltd 1972(4) SA 103 (RS) at 104D.**

In my view the plaintiff has provided sufficient evidence of the basis of its loss in respect of claim 2. Mr Schlesinger, whom I consider to be a fair and honest witness, was adamant that his allowance of 10% for direct deliveries was generous. Being in control of the plaintiff's business he should know. I do not think that the haphazard annotations of the word "stockpile" detracts from that.

It is true that Mr Schlesinger acknowledged that he could not say with certainty that his consequential damage amounted to R46 000.00. This fair concession means no more than that one can never calculate damages with mathematical exactitude. What Mr Schlesinger has done, was to give a rational basis for the calculation of his loss, based on actual volumes transported and the known operating costs of his vehicles. For the purposes of proof on a balance of probabilities that is sufficient. The second claim should therefore succeed in the amount of R46 377.80.

That brings me to the issue of costs. The parties were ad idem that the costs reserved on 7 March 2008 should be costs in the cause.

Mr Wessels contended for costs on a High Court scale. The normal situation is that a party must sue in the magistrate's court if that court has jurisdiction and that he will only be awarded costs in a High Court scale if there are circumstances justifying such an order. In **Keyter v De Wet NO 1967(1) SA 20(o) at C-28G** the issue is discussed and instances are given of circumstances that may justify an award of High Court costs.

In my view there are special circumstances justifying an award of costs on the High Court scale. In the first place the total award is more than R95 000.00. Although I cannot say that the law and the facts were very complex, it is a fact that the presentation of the evidence took up three court days. Argument was addressed on a fourth day. A trial of this magnitude, if not complexity, could easily be accommodated in the High Court where there is a continuous roll for civil trials. In the magistrate's court, as Mr Wessels pointed out, there is no continuous roll for civil trials, and a lengthy matter can only be enrolled for a number of consecutive days by special dispensation.

In this context it must also be remembered that on a previous occasion it was estimated that this case would take seven days.

In view of these circumstances I am therefore of the view that costs should be awarded on the High Court scale.

The following order is made:

Judgment is granted against the defendant for:

- 1. Payment of the amount of R49 159.08.**
- 2. Payment of the amount of R46 377.80.**
- 3. Interest on the amounts of R49 159.08 and R46 377.80 at 15.5% per annum from date of judgment to date of payment.**
- 4. Costs on the High Court scale which costs shall include:**
 - 4.1 The costs reserved on 7 March 2008.**
 - 4.2 The qualifying fees of the witnesses Candasamy, du Toit and Prinsloo.**

C BOTHA

JUDGE OF THE HIGH COURT