

Reportable: Yes / No
Circulate to Judges:
Yes / No

Circulate to Magistrates: Yes / No

IN THE HIGH COURT OF SOUTH AFRICA
(Northern Cape Division)

Case No.:1550/05

Heard:22-24/05/2007

Delivered:29/06/2007

YELLOWJACKET (PTY) LIMITED

Plaintiff

versus

SANDRA SMIT N.O.

First Defendant

FRANCOIS JACOBUS DU TOIT N.O. Second Defendant

FRANCOIS JACOBUS DU TOIT N.O. Third Defendant

FRANCOIS JACOBUS DU TOIT N.O. Fourth Defendant

JUDGMENT

MOKGOHLOAJ

1. The plaintiff, Yellow Jacket (Pty) Ltd company, instituted action against the defendants, Sandra Smit N.O. and Francois Jacobus Du Toit N.O., for damages suffered by the plaintiff as a result of the collision between the plaintiff's vehicle a 2003 model International Truck Tractor with registration numbers NU 26881 ("the truck") and

a motor vehicle with registration numbers FFB 726 NW ("the bakkie"). The said collision occurred on 11 March 2004 along the N1 high way between Richmond and Hanover, Northern Cape.

2. All four people travelling in the bakkie i.e. Maria Basson , Jasper Christoffel Gerhardus de Beer, Hermanus Johannes de Beer and Marieta de Beer were killed. The defendants are sued in their capacities as executors of the deceaseds' estate.
3. At the commencement of the trial, I was informed by both parties that the defendants have conceded to the merits of the plaintiff's claim as well as the plaintiff's costs of towing the vehicle in the amount of R9 177-00. The only issue which remains to be adjudicated is the quantum of the damage suffered and costs. Exhibit 'A' which is the plaintiff's bundle was referred to extensively by both parties during the trial.
4. The plaintiff's claim is for the amount of R806 147-36 alternatively R764 177-00 made out as follows:
 - 4.1. Reasonable costs for the necessary repairs on the truck as per quotation from Hermans Truck Accident Repairs, item 4 on Exhibit

'A', in the amount of R547 868 -79 plus costs of engine repairs as per quotation from Cummins Diesel South Africa (Pty) Ltd, item 5 in Exhibit 'A' amounting to R249 106-36.

- 4.2. Alternatively, the difference between the pre-accident value of the truck and the post-accident marked value thereof in the amount of R755 000-00.

5. **The Plaintiff's Case:**

The plaintiff called Mr Paul Edward Hamilton, an expert witness to testify. Hamilton is employed at Hamilton Ramsden & Alley Loss Adjusters and has 20 years experience as a mechanic and fitter and 25 years experience as a loss adjustor. He is also a member of the Institute of Loss Adjustors.

6. Hamilton's evidence was that these type of trucks are imported new and the purchase price vary with exchange rates. The price of the plaintiff's truck is R1 014 600-00 Including Vat. He examined the plaintiff's truck immediately after the accident. The truck was ten months old and had travelled 146 046km. According to him the trade and retail figures issued by Mead & McGrouther are used as a guideline in as much as they are based on a fixed depreciation

against a new price list.

7. The policy of insurance was insured on a retail basis and he suggested to the insurers a figure of R859 000-00. Retail value settlement is a commercial arrangement between an insurer and the client and the industry standard is to settle on the average i.e. mean, between trade and retail which is according to Hamilton R803 766-00 including Vat, at the time of loss. Hamilton arrived at this figure after using Mead & McGrouther depreciation figures.
8. According to Hamilton, the fair and reasonable value of the wreck truck amounts to R95 000-00 including Vat as per quotation by Acme Services item 13 in Exhibit 'A'. Deducting this figure from the mean leaves a difference of R708 766-00. In coming to this conclusion the value aforesaid has to be balanced against the repair costs. The truck was under warrant from Tyco International and repairs, if possible, would have to be conducted by a company acceptable to Tyco namely Hermans and Cummins. Hamilton stated that the underwriters would have negotiated a discount of 5% beforehand. The quotation for repairs by Hermans and Cummins amounted to R768 500-18 (item 4 and 5 in Exhibit 'A').

Hamilton deducted an amount of R8000-00 for each salvage and 5% discount and the fair and reasonable repair costs according to him, was R722 075-17.

9. Having regard to the amount of R722 075-17 against the value salvage figures and further regard to the distinct possibility of undiscovered damage to the engine, Hamilton came to the conclusion that it is uneconomical to repair the truck.
10. Hamilton was the only witness for the plaintiff. Mr Bitter, for the defendants, made an application for absolution from the instance. He argued that the plaintiff has failed to prove the pre-collision and post-collision market value of the truck. He argued further that item 14 in Exhibit 'A' which is the quotation from Tyco Trucks refers to another truck and not the truck in question. He said the plaintiff could have adduced the best evidence by calling a witness to confirm the purchase price of the truck in question. Mr Bitter further argued that the amount of R95 000-00 is not a conclusive amount on the wreck as the plaintiff failed to get quotations from other dealers.
11. I dismissed the defendant's application for the absolution from the

instance as there was prima facie evidence against the defendant. The defendants did not call any witness and closed their case.

12. In order to succeed in his claim, the plaintiff must prove on a balance of probabilities that he has suffered damages and to what extent. **(See Visser P.J. JM Law of Damages)** The plaintiff's measure of damages for the damage on the vehicle is the damaged vehicle's diminution in value. A more common method of determining the plaintiff's damages is to prove the amount it would cost to repair and restore the vehicle to its pre-collision condition. This method can only be used if the costs of the repairs do not exceed its diminution in value. **See RG McKerron The Law of Delict 5th ed at page 108.**
13. To prove the diminution in value it is not sufficient for the plaintiff merely to adduce evidence of an offer for the vehicle prior to the collision and the amount for which he sold it in its damaged state. The plaintiff should adduce evidence from an expert, e.g. an insurance assessor, of the vehicle's pre-collision and post-collision market value. **See Myburgh v Hanekom 1966 (2) SA 157 (GW) 161F-G**

14. **In Turkstra Ltd v Richards 1926 TPD 276 at 283 Stratford J remarked as follows:** “When there is a finding for an admission that the damage has been caused in a monetary amount, the Court must do its best to assess the amount of such evidence as is available, and you cannot non-suit a plaintiff because, in the nature of things the damage cannot be computed in exact figures” **See also Hersman v Shapiro & Co. 1926 TPD 367 at 379 and Lazarus v Rand Steam Laundries 1946 (Pty) Ltd 1952 (3) S.A. 49 (T) at 50- 51A.**
15. Hamilton’s testimony showed that the costs of the repair in this matter exceed the diminution value of the truck and that it would be uneconomical to repair it. He stated the pre-collision value of the truck based on the invoice from Tyco Trucks which relates to the same model of the truck. According to Hamilton, the plaintiff bought this same truck from Tyco Trucks in the same month. This was not challenged during cross-examination. He further used Mead & McGrouther guideline to determine the price of the truck at the time of the collision. **See Erasmus v Davis 1969 (2) SA 1 (1) at 7B.**

16. In **Enslin v Meyer 1960 (4) S.A. 520 (T)** the plaintiff in proving the market value of the car after the accident, adduced evidence of an offer made by one Van Vuuren who had no expert knowledge of motor value. In the present case, the plaintiff obtained the quotation from Acme Services for R95 000-00. Hamilton with his knowledge and experience as a motor mechanic advised the plaintiff to accept this offer.
17. In **Hersman v Shapiro & Co. (supra) at 379 -380** the court expressed the following:

“There are cases where assessment by the Court is very little more than an estimate; but even so, if it is certain that pecuniary damage has been suffered, the Court is bound to award damages. It is not bound in the case where evidence is available to the plaintiff which he has not produced; in those circumstances the court is justified in giving, and does not give, absolution from the instance. But where the best evidence available has been produced, though it is not entirely of a conclusive character and does not permit of a mathematical calculation of damages suffered, still, if it is the best evidence available, the Court must use it and

arrive at a conclusion based upon it”.

18. I am of the view that all relevant evidence relating to the issue of damages suffered by the plaintiff have been placed before me. I am satisfied that the plaintiff has discharged its onus on a balance of probabilities.

19. Mr Bitter argued that if I find that the plaintiff has succeeded in proving its case on quantum, then judgment should be granted against the second defendant only. He submitted that the defendants have conceded in their plea that Jasper De Beer was the driver of the bakkie at the time of the accident. The plaintiff's claim arose out of the negligent driving of a motor vehicle and logic dictates that a vehicle can be driven by one person at a time. At this stage, there is no liability that can be imputed against the other three defendants.

20. The above having been stated I find as follows:

20.1. That the accident occurred as a result of the sole negligence of the second defendant (Jasper Christoffel Gerhardus De Beer) as represented by Francois Jacobus Du Toit;

- 20.2.** That the plaintiff has discharged its onus on quantum on a balance of probabilities;
- 20.3.** That the pre-collision marked value of the truck is R803 766-00; and its post-collision market value is R95 000-00;
- 20.4.** That the difference between the pre-collision and post-collision market value is R708 766-00
- 20.5.** That the second defendant is liable to the plaintiff in the amount of R708 766-00 plus towing costs of R9 177-00.

21. There is no reason why costs should not follow the result.

I therefore make the following order.

ORDER

1. Second defendant is ordered to pay to the plaintiff an amount of R717 943-00 plus costs.
2. Second defendant is ordered to pay to the plaintiff interest on the amount R717 943-00 at the rate of 14% per annum a tempore morae.

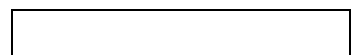
**F.E. MOKGOHLOA
ACTING JUDGE
NORTHERN CAPE DIVISION**

On behalf of the Plaintiff :Adv P. Fischer

Instructed by :Engelsman Magabane Inc.

On behalf of the Defendant :Adv J. Bitter

Instructed by :Fletcher's Attorney



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IN THE HIGH COURT OF SOUTH AFRICA

(Northern Cape Division)

Case No:

Heard:

Delivered:

ORANJE KOÖPERASIE BEPERK

APPLICANT

versus

GIDEON GABRIEL NIEUWOUDT

RESPONDENT

JUDGMENT

MOKGOHLOAJ

22. The applicant brought an application before the respondent on 11 August 2006 wherein he sought an order in the following terms:

“1. Die betaling van ‘n bedrag van R120 000.00 tesame met rente daarop

bereken soos volg:

1.1 Vanaf 1 April 2005 tot 14 April 2006 teen ‘n koers van 15% per jaar.

1.2 Vanaf 15 April 2006 tot datum van betaling teen ‘n koers van 14,5% per jaar.

2. Betaling van die bedrag van R1 528.76.

3. Betaling van die bedrag van R1 453.14.

4. Betaling van die bedrag van R1 477.80.

5. Betaling van die bedrag van R116 929.26 plus rente bereken teen 14,5%

per jaar vanaf 16 April 2006 tot datum van betaling.”

23. The applicant stated in his affidavit that there was a dispute between hi and the respondent and that the matter was then referred for arbitration. On 27 April 2005 the parties attendant an arbitration and a settlement was reached per agreement between the parties and the following was made an order of the Arbitration:

“2. DIE LID sal die bedrag van R500 000.00 (Vyfhonderd Duisend Rand)

aan die Koöperasie betaal en wes as volg:

- 2.1 Vyftig Duisend Rand (R50 000.00) betaalbaar voor of op 6 Mei 2005.
- 2.2 Vyftig Duisend Rand (R50 000.00) betaalbaar voor of op 30 Junie 2005.
- 2.3 Vyftig Duisend Rand (R50 000.00) betaalbaar voor of op 30 Augustus 2005.
- 2.4 Eenhonderd En Twintig Duisend Rand (R120 000.00) betaalbaar voor of op 31 Januarie 2006.
- 2.5 Eenhonderd En Tien Duisend Rand (R110 000.00) betaalbaar voor of op 28 Februarie 2006.
- 2.6 Eenhonderd En Twintig Duisend Rand (R120 000.00) betaalbaar voor of op 31 Maart 2006.

3.1 Die uitstaande balans van die kapitaal vermeld in paragraaf 2 sal rente dra

teen die dan heersende prima koers van die Absa Bank Bpk. Soos van tyd tot tyd deur gemelde bank vasgestel plus vier persent.

3.2 Die rente sal bereken word op die kapitaal vermeld in paragraaf 2 en sal

enkelvoudig saamgestel en bereken word.

3.3 Die rente, bereken vanaf 27 April 2005, sal maandeliks betaal word deur

die lid met die eerste betaling 6 Mei 2005 en maandeliks daarna voor of op die 7de dag van elke maand.

4. Sou die lid nalaat om enige betaling voor of op die toepaslike betaaldatum te

maak, dan in daardie geval sal die volgende procedure geld:

4.1 Die Koöperasie sal die lid 7 dae kennis van die versuim gee per telefaks by

faksnommer 054 – 451 0036.

4.2 Dit sal geag word dat die lid die kennisgewing in die voorafgaande paragraaf

ontvang het binne 3 dae nadat die kennisgewing so gefaks is.

4.3 Indien die lid nalaat om die betaling dan verskuldig binne 7 dae te maak,

dan in daardie geval sal die hele uitstaande bedrag plus rented an verskuldig

wees om hierdie toekenning 'n bevel van die Hof te maak en sodanige eksekusie stappe teen die lid te neem as waarop hulle voortspruitend daaruit geregtig is.

5.1 Die lid sal 60 persent van die ooreengekome of getakseerde koste van

die Koöperasie betaal en wel binne 30 dae na sodanige ooreenkoms of allokasie van die rekening, welke koste en uitgawes van die arbitrasie en arbiter.

5.2 Indien die partye nie op die omvang van die koste kan ooreenkom nie, sal die kosterekening getakseer word deur die takseermeester van die Hooggeregshof, Kimberley.

5.3 Koste, soos tussen party en party, sal op die skaal en teen die tariewe van die Hooggeregshof betaalbaar wees.

24. The applicant states that the respondent failed to make payment of an amount of an amount of R120 000.00 which amount was due to be paid on 31 March 2006 and that this amount is now due and payable. He further claims interest from 1 March 2006 to 31 May 2006 and taxed costs.

25. The applicant's notice of motion was served on the respondent on 25 May 2006. The respondent served his notice to oppose on 19 June 2006. On 28 June 2006 the applicant served his notice to amend the notice of motion by adding new paragraphs ie.

"6. Koste van aansoek

7. Verder en/of alternatiewe regshulp"

On 11 July 2006 the applicant set the matter down for trial. The respondent served a notice in terms of Rule 30(2)(b) of the Uniform

Rules and asked for an order setting aside the applicant's notice of set down as an irregular step as the applicant failed to afford the respondent enough time to file his opposing affidavit to the applicant's application.

26. Rule 28 of the Uniform Rules of Court provides the procedure to be followed when amending a plea or document. In particular Rule 28 provides:

“(2) The notice referred to in subrule (1) shall state that unless written objection

to the proposed amendment is delivered within 10 days of delivery of the

notice, the amendment will be effected...

(3)

(4)

(5) If no objection is delivered as contemplated in subrule (4), every party

who received notice of the proposed amendment shall be deemed to

have consented to the amendment and the party who gave notice of the proposed amendment may, within 10 days after the expiration of the period mentioned in subrule (2), effect amendment as contemplated in subrule (7).

6)

7) Unless the court otherwise directs, a party who is entitled to amend

shall effect the amendment by delivering each relevant page in its amended form.”

6. Advocate Schreuder on behalf of the applicant argued that it was not necessary for the applicant to deliver an Amended Notice of

Motion as Rule 28(7) provides that only amended pages need to be delivered. He further argued that Rule 28(5) gives the applicant a discretion to deliver an amended page as it refers to “*may*” (“*kan*”). This cannot be true. Rule 28(7) states that a party shall effect the amendment by delivering each relevant page in its amended form (my underlining).

**MOKGOHLOA
ACTING JUDGE**

On behalf of the Applicant	:	
Instructed by	:	
On behalf of the Respondent	:	
Instructed by	:	