

SOUTH AFRICA / JUDGMENT

Helderberg Car & Propshaft Centre CC t/a Propshaft Centre v Nexor 519 t/a Protec Crane Hire (CA177/2011) [2012] ZAECHGHC 41 (24 May 2012) [2012] ZAECHGHC 41

COURT

Eastern Cape High Court, Grahamstown

BEFORE

Sandi, Mjali, Conjwa

CASE / FILE NUMBER

CA177/2011

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FORM A

FILING SHEET FOR EASTERN CAPE JUDGMENT

IN

THE HIGH COURT OF SOUTH AFRICA

(EASTERN

CAPE DIVISION)

PARTIES: HELDERBERG CAR AND PROPSHAFT CENTRE CC

t/a PROPSHAFT CENTRE Appellant

and

NEXOR 519 t/a

PROTEC CRANE HIRE Respondent

REFERENCE NUMBERS –

Registrar:

CASE NO:177/2011

Supreme

Court of Appeal / Constitutional Court : HIGH COURT, EASTERN CAPE
DIVISION

DATE HEARD: 26

March 2012

DATE DELIVERED: 24

May 2012

JUDGE(S):

SANDI J, Mjali J and Conjwa AJ

LEGAL

REPRESENTATIVES –

Appearances: for
the Appellant (s): ADV DE LA RAY
for
the Respondent (s): ADV RONAASEN
Instructing

Attorneys:

Appellant(s): WHITESIDES ATTORNEYS

Respondent(s): NEVILLE BORMAN & BOTHA

SUMMARY: Damages
– proof of damages – plaintiff placing evidence before
the Court all such evidence as is available to it in
support of
quantum of damages – defendant contending that evidence not
sufficient. Court held that where mathematical calculation
is not
possible the evidence adduced by plaintiff was sufficient.
Accordingly plaintiff's action succeeded.
EASTERN
CAPE DIVISION, GRAHAMSTOWN
REPORTABLE
Case
no: CA177/2011
Date
Heard:26/03/2012
Date
Delivered:24/05/2012
In

the matter between: HELDERBERG CAR AND
PROPSHAFT CENTRE CC
t/a PROPSHAFT CENTRE
.....Appellant
NEXOR 519 t/a PROTEC
CRANE HIRERespondent

JUDGMENT

SANDI J:

- [1] This is an appeal against the judgment of Roberson J in which she found that the appellant was liable for payment of damages to the respondent for breach of contract amounting to R303 735.88 with costs. It is with her leave that the matter is now on appeal before us.
- [2] For convenience I shall refer to the appellant as defendant, and to the respondent as plaintiff.

- [3] The plaintiff is the owner of two cranes, namely a 180 ton crane and a 55 ton crane both of which, by agreement, were to be repaired by defendant. In respect of the 180 ton crane it was required of the defendant to manufacture a driveshaft and refurbish a second sideshaft. Repairs required in respect of the 55 ton crane were to refurbish and refit the propshaft.
- [4] In its judgment the Court a quo found that the defendant's work on and repairs to the cranes were not done in a workmanlike and efficient manner. This finding is not challenged before us. What the defendant challenges is the quantification of plaintiff's damages.
- [5] According to the plaintiff's particulars of claim, the plaintiff suffered the following damages:-

"7.1.1 The amount paid to the Defendant in respect

of the defective workmanship in terms of Annexure

"A" hereto: R 19, 997.79

7.1.2 The costs of the repairs to the crane as
detailed in Annexure "C1" and -

"C2" hereto: R 198, 823.27

7.1.3 The costs of the repairs to the crane as
detailed in Annexure "D" hereto: R 35, 368.50

Subtotal: R254, 189.56

In respect of the 55 ton crane:

7.2.1 Payments to the Defendant in respect
of the defective workmanship in terms
of Annexure "B" hereto: R 10, 711.48

7.2.2 The costs of repairs to the crane as
detailed in Annexures "E1", "E2",

"E3" and "E4" hereto: R 38, 834.84

Subtotal R 49,546.32

TOTAL: R 303,735.88

- [6] The annexures to the particulars of plaintiff's claim detail the repairs to be done on the cranes, each part acquired and the price thereof.

- [7] In paragraph 18 of its notice of appeal the defendant concedes that the amounts of R19,979.00 and R10 711.48 as reflected on annexures A1, B1, and B2 were due to the plaintiff.
- [8] However, in respect of the rest of paragraph 7 of the particulars of claim as set out above it pleaded as follows:
- “(t)he defendant bears no knowledge of the allegations contained herein, denies same and plaintiff is put to the proof thereof.”*
- [9] On appeal before us the only amounts in dispute are those set out in paragraphs 7.1.2; 7.1.3; 7.2.1 and 7.2.2.
- [10] Amongst the witnesses who testified at the trial were Ferreira, Herselman and Knicklebein for the plaintiff, whilst Young and Serfontein testified for the defendant.
- [11] Before Ferreira testified the plaintiff delivered an expert notice in terms of Rule 36(9)(b) of the Uniform Rules of Court in which Ferreira’s qualifications are set out. They are the following: he has a government ticket in mechanical engineering and to obtain these qualifications he underwent an apprenticeship and a three year course at the University of Port Elizabeth. He has nineteen years experience working with cranes. He is also a boilermaker.
- [12] A summary of his evidence regarding the damage caused to the two cranes as well as his opinion on the cause of the damage and the reasonable and necessary costs of repairing them are set out therein.
- [13] In his evidence he testified particularly as follows:
- “And then you say by virtue of your extensive experience with cranes in the field of mechanical engineering qualified to express an opinion as to the damage suffered to 180 ton and 55 ton cranes belonging to the plaintiff which were damaged as result of the defective workmanship of the defendant, that is Propshaft Centre, the nature of the repairs required to remedy the defective work and the cost of such repairs. So you say you are qualified to express an opinion on that?---That is correct.”*
- [14] Ferreira testified that the plaintiff had no mechanics in its employ. Repairs to the cranes were outsourced by the plaintiff to the other companies such as the defendant, Electrical Suppliers, P.E. Airbrakes and Metro Hydraulics.
- [15] It is common cause that the Plaintiff and defendant represented by Ferreira and Serfontein, respectively, agreed that the defendant was to manufacture a driveshaft for one of the wheels of the 180 ton crane. Ferreira testified that the defendant failed to do so. Instead, it resleeved the defective shaft. As the 180 ton shaft was being tested for the first time after the work done on it by the defendant, the crane failed the test. On inspection Ferreira discovered that instead of installing a new driveshaft the defendant had welded and resleeved the existing shaft. Ferreira testified that the driveshaft installed by the defendant damaged the planetary gears of the crane. In his evidence he stated that the extent of the damage to the crane was particularised in Annexures “C1”, “C2” and “D” of the particulars of

claim.

- [16] Ferreira testified that the costs of repairing the crane as set out in the above annexures were reasonable and necessary in the circumstances. In his evidence he gave details of the damage caused to the crane and stated further as follows:

“ and you say you found it to be welded?---Welded ja.

And resleeved ---Resleeved ja

And why, in your experience of cranes would you say that would have failed in those circumstances?---There is no way that you could ever, ever weld that shaft with the amount of torque and the weight that the crane has got. If you take a normal front wheel drive axle with CV joints and that shaft breaks there is no way you will ever weld that shaft on a normal car.”

- [17] Ferreira identified the damage to the crane and also referred to the photographs of the damaged parts. He said it was necessary to replace those parts in order to get the crane to function again.
- [18] In respect of the 55 ton crane the evidence of Ferreira was that the defendant did not perform its work in a proper and workmanlike manner on the said crane in that instead of using propshaft bolts with a 10.8 tensile strength it used bolts of an inferior quality and strength (ie 8.8 tensile strength). Because the bolts were of insufficient tensile strength they sheared, causing the driveshaft to break. According to Ferreira extensive damage was caused to the undercarriage of the crane. Had the correct bolts been used this would not have happened. Regarding this claim Ferreira testified with reference to annexures “D”, “E1”, “E2”, “E3” and “E4”: he stated that from his own experience he was satisfied that the amounts set out in these annexures were reasonable and necessary. According to him he was qualified to give that opinion. He also identified the damage caused to the crane with reference to certain photographs. In his evidence he testified about electrical cables that were ripped off and a damaged hydraulic pipe. Both the electrical cable and the hydraulic pipe had to be replaced.
- [19] Towards the end of Ferreira’s cross-examination the following was put to him by defendant’s counsel:

“ Now Sir you would agree with me that you are not an expert in electronics? --- No, I am not an expert.

You are not an expert in hydraulics? --- No, I am not.

You have not serviced cranes for many, many years, it does not form part of your business. --- I never serviced the cranes he worked on, put it to you that way. I have got checklists in my company where my cranes get checked every single day before they go out and I go through the checklists.

And you are not a break specialist at all? --- I am not a break specialist. That is why I hire those people to do the work for me.

And sir I put it to you, seeing the fact that you are a specialist in none of those aspects, that you cannot state to this court that the quotations given to you are fair and reasonable. --- Of course I can sir, I have been working with cranes for many years.”

- [20] In re-examination he persisted in his evidence that his nineteen years’ experience working with cranes and his qualification as a mechanical engineer qualified him to give an opinion as to the damages suffered by the plaintiff in respect of the cranes. He also said that the amounts reflected on the quotations placed before the court in respect of the two cranes were reasonable and necessary in the circumstances.
- [21] Deon Nickelbein is a specialist in pneumatic brakes with fourteen years’ experience in the field. He works in his own business as P. E. Airbrakes. He testified that he inspected the damage caused to the 55 ton crane and confirmed that the crane had suffered the damage set out in annexures “D”, “E1”, “E2”, “E3” and “E4” to the plaintiff’s particulars of claim. He also testified that the repairs to the crane were effected by his business. He identified the invoice that was issued by the firm and testified that it was reasonable and necessary to effect the repairs set out therein.
- [22] At the time he inspected the 55 ton crane he noticed that the bolts were loose as well as the driveshaft and centre bearing.
- [23] He also had occasion to examine the 180 ton crane after it was damaged. His examination of the crane revealed that it had no problems with the pneumatic brakes and he suspected that there was a problem with the differential of the crane, something which he mentioned to Ferreira.
- [24] Serfontein, the owner of Propshaft Centre CC (the defendant), also testified. His business involved the manufacturing and refurbishing of propshafts. He and Ferreira had a good business relationship. He testified that Propshaft Centre CC started doing business with the plaintiff in 2007.
- [25] In evaluating the evidence of Ferreira and Serfontein the Court a quo accepted the evidence of Ferreira while rejecting that of Serfontein. It found Ferreira was an honest and sincere witness. Serfontein did not impress the Court a quo in his evidence and was found to have been an untruthful witness.
- [26] In the result the Court a quo found for the plaintiff in the amount stated above.
- [27] The only issue now before us is the quantum of plaintiff’s damages as set out in paragraphs 7.1.2; 7.1.3; 7.2.1 and 7.2.2. The rest of the damages having been conceded by defendants in its notice of appeal.

- [28] Briefly the plaintiff's case was presented in the following fashion. In its particulars of claim the plaintiff attached all relevant invoices and quotations which set out in detail the cost of each of the parts required to repair the cranes. An expert notice in respect of Ferreira prepared in terms of Rule 36(9)(b) of the Uniform Rules of Court was delivered. In the expert notice Ferreira qualified himself as an expert witness and gave an opinion as to the cause of the damage to the cranes. In his evidence he testified that the costs referred to in the invoices and quotations were reasonable and necessary in the circumstances of this case. He said so with reference to his extensive knowledge and experience of working with cranes for about nineteen years. He testified that the defendant had, in terms of an oral agreement, a free hand to examine the cranes at least once per month and to recommend to him the work necessary to be done on the cranes. He said that Serfontein would, after examining the cranes, telephone him and they would reach an agreement regarding the costs of the repairs.
- [29] I am left in no doubt that Ferreira is possessed of sufficient experience in dealing with the cranes. His evidence demonstrated that he had extensive knowledge and experience of cranes. For instance, he stated that he had instructed the defendant to manufacture a driveshaft for the 180 ton crane. Instead of doing so, the defendant welded it. He testified that it was welding of the shaft that caused the shaft to collapse and damage the crane in the manner described by him.
- [30] In respect of the 55 ton crane, he testified that the defendant used 8.8 tensile strength bolts instead of 10.9. He said the bolts were substandard or inferior and that their shearing caused the damage to this crane.
- [31] He inspected both cranes after the damage was caused to them. At the trial he testified with regards to the damage and was able to explain every bit of damage caused to the cranes.
- [32] The Court a quo accepted the evidence of Ferreira and found in favour of the plaintiff.
- [33] In argument before us defendant's counsel submitted that in order to prove plaintiff's damages it is not sufficient for the plaintiff to merely produce invoices and quotations as proof of its damages. Counsel argued that the parties who gave the quotations or invoices ought to have given evidence that the costs involved were reasonable and necessary.
- [34] In support of this submission counsel referred to a number of judgments all of which deal with the principle of assessment of damages. They all state that it is the duty of the plaintiff to prove that the costs of repairs were reasonable and necessary and that it is persons conversant with the trade in question who may give such opinion. *Scrooby v Engelbrecht* 1940 TPD 100. Though the issue was not raised in *Paarl Transport Services v Du Toit* 1946 CPD 189, the court mero motu held that it is not sufficient to put in the accounts showing what has been paid for the damages caused to the plaintiff's car.

- [35] The plaintiff's cause of action was based on the cost of the parts necessary to restore the cranes into their pre-collision position. It was not suggested by the defendant that the costs were not reasonable and necessary or that the plaintiff could in some way have mitigated his damages. In the Court a quo and before us the plaintiff's case was presented on the basis that the costs of the parts were reasonable and necessary to repair the two cranes.
- [36] In *Hanos v Barnett* 1972 (1) SA 334 (T), the plaintiff's vehicle suffered damages as a result of the negligence of the defendant. He claimed the necessary costs to repair the damage. The Magistrate granted the plaintiff damages. The only evidence tendered before the Magistrate was that of the plaintiff, an oculist by profession. No evidence was tendered by the defendant. The plaintiff had never been a panelbeater. In an attempt to prove his damages, the plaintiff relied on the lowest quotation he had obtained. No one was called to support the reasonableness of the quotation.
- [37] On appeal it was held that at 335 of the *Hanos* judgment (supra) that quotation was hearsay evidence and that:

"It could very well be the case that the charges were still too high or unnecessary, and despite the fact that defendant placed this very question in issue, no one qualified in the trade was called as a witness by plaintiff to express a supporting opinion. In Scrooby v. Engelbrecht, 1940 T.P.D. 100, it was held that the appellant had failed to prove his damages, where the only evidence on the question of damage consisted of the production of an account received from the repairer, A and a statement that the repairs reflected in the account were necessary as a result of the accident in which his car was damaged."

See also *Heath v Le Grange* 1974 (2) SA 262 (C).

- [38] Ferreira is not just an ordinary person who does business with cranes. At the trial he demonstrated his knowledge of the cranes and, more particularly, its parts and the damage caused to them. In the Court a quo he identified the damaged parts of the cranes and the cause thereof. The Court a quo accepted his evidence and made a finding that he was an expert witness in this matter. This finding has not been challenged by the defendant.
- [39] Bald questions were put to him that he was not an expert in the fields in which he gave evidence. He denied this vehemently and stated that the parts of the cranes referred to in the invoices and quotations were reasonable and necessary in the circumstances. Save for the bald questions put to him by defendant's counsel under cross-examination, none of the amounts set out in the invoices and quotations were challenged under cross-examination.
- [40] At the end of plaintiff's case his evidence stood unchallenged and none of the witnesses who testified on the defendant's behalf made any attempt to gainsay it. The only witness called by the defendant to gainsay plaintiff's evidence conceded that he was not able to express any opinion on the damage to the crane without having inspected them.

[41] On the other hand, Ferreira inspected the cranes after they were damaged. Photographs of the damages were taken. At the trial the plaintiff was able to give independent evidence and also referred in detail to the photographs that were taken after the damage.

[42] Defendant and his witnesses did not challenge his evidence that the parts referred to in the documents placed before the court were reasonable and necessary.

[43] In the pleadings as well as the plaintiff's evidence it was not even suggested that the parts referred to exceeded the diminution value of the cranes. Of course the plaintiff's cause of action was not based on that. It was based on cost of the parts necessary to repair the cranes.

[44] A Court of Appeal would not interfere with the award of damages unless the trial court committed a misdirection or its award is based on inadequate evidence.

[45] In *Esso Standard SA (Pty) Ltd v Katz*, 1981 (1) SA 964 (A) 969H-970B Diemont JA stated that:

"These principles have been conveniently summarized by DE VILLIERS J in Lazarus v Rand Steam Laundries (1946) (Pty) Ltd 1952

(3) SA (T). It has long been accepted that in some types of cases damages are difficult to estimate and the fact that they cannot be assessed with certainty or precision will not relieve the wrongdoer of the necessity of paying damages for his breach of duty. Among authorities

in the Lazarus case is *Hall v Ross* III English Law Reports 672 which was decided as long ago as 1813. Not only is the principle not a novel one but the English precedents

which have given some guidance on the problem have gone so far as to hold that the Court doing the best it can with insufficient material may have to form conclusions on the matters on which there is no evidence and to make allowance for contingencies even to the extent of making a pure guess."

In this matter the plaintiff has not merely placed documentary evidence before the court. He has tendered evidence which, in my view, has correctly been accepted by Roberson, J.

[46] See also *Aaron's Whale Rock Trust v Murray & Roberts Ltd and Another* 1992 (1) SA 652 (C) at 655 H – J:

"Where damages can be assessed with exact mathematical precision, a plaintiff is expected to adduce sufficient evidence to meet this requirement. Where, as is the case here, this cannot be done, the plaintiff must lead such evidence as is available to it (but of adequate sufficiency) so as to enable the Court to quantify his damages and to make an appropriate award in his favour. The Court must not be faced with an exercise in guesswork; what is required of a plaintiff is that he should put before the Court enough evidence from which it can, albeit with difficulty, compensate him by an award of money as a fair approximation of his mathematically unquantifiable loss."

[47] In my view the plaintiff has placed such evidence as was available to it to prove the quantum of its damages. In my view, the Court a quo was correct in its assessment of the quantum of damages on the material placed before it. Indeed, in a case like this, it is difficult to calculate the damages with mathematical precision.

[48] In the circumstances the appeal is dismissed with costs.

B. Sandi

Judge of the High Court

I Agree,

G.N.Z Mjali

N. Conjwa

Acting Judge of the High Court

Counsel for the Appellant: Adv. De La Ray

Instructed by Whitesides Attorneys

Counsel for the Respondent: Adv. Ronaasen

Instructed by Neville Borman & Botha Attorneys

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