

SOUTH AFRICA / JUDGMENT

Naidoo v Muswe and Another (D13877/2014) [2020] ZAKZDHC 12 (8 May 2020) [2020] ZAKZDHC 12

COURT

Kwazulu-Natal High Court, Durban

BEFORE

Steyn

CASE / FILE NUMBER

D13877/2014

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IN THE HIGH COURT OF
SOUTH AFRICA
KWAZULU-NATAL LOCAL
DIVISION, DURBAN
CASE NO. D13877/2014

In the matter between:

DEVAPRAGASEN
NAIDOO
PLAINTIFF
and
I
MUSWE
FIRST DEFENDANT
SPEED TRANS
CC
SECOND DEFENDANT
(Registration
No:1991/032790/23)
ORDER

This
judgment was handed down electronically by circulation to the
parties' representative by email, and release to SAFLII.
The
date and time for hand down is deemed to be 09h30 on 8 May 2020.
The following

order is issued:

The action is
dismissed with costs.

JUDGMENT

Steyn J:

- [1] This claim arose from a motor vehicle collision that occurred on 28 March 2014, when the first defendant, an employee of the second defendant, whilst driving a Mercedes Benz truck with registration letters and numbers ND 126624, collided with the plaintiff's sports vehicle, a Porsche 911, a 2010 model bearing registration letters and numbers NJ 34186 ('the plaintiff's vehicle').
- [2] On 23 May 2016, the parties reached an agreement on liability, whereby the defendants agreed to pay the plaintiff 100 per cent of the agreed or proved damages in respect of the plaintiff's vehicle.
- [3] The trial proceeded on quantum only. The plaintiff bore the onus to demonstrate to this court the damages that were caused by the defendants. In his particulars of claim the plaintiff claims for the following damages:
- (i) An amount of R565 700; and
 - (ii) An amount of R14 614.80.

The computed amount for all the damages suffered by the plaintiff is R580 314.80. In terms of the particulars of claim, the plaintiff claims the difference between the pre-collision and post-collision values and not the repairs to the vehicle.[1]

- [4] It is trite that an owner's damages to a vehicle are determined by the diminution in value of the vehicle. Generally, this can be done by proving the vehicle's pre-collision and post-collision values or the reasonable costs of the repairs.[2] The plaintiff has sought not to claim for the repairs to his vehicle but instead claimed that his vehicle was so severely damaged that it could not be economically repaired.
- [5] The plaintiff in proving his claim relied on the evidence of two witnesses, namely, Mr Johnson, an expert, and Ms Botes. The defendants called one expert witness, Mr Simpson.
- [6] The plaintiff filed the expert notice of Barland Johnson, a motor vehicle assessor, who had assessed the damages to the plaintiff's vehicle. In short, Mr Johnson stated:
- (i) That he assessed the damages to the plaintiff's vehicle post the collision; and
 - (ii) That he ascertained that the said Porsche 911 vehicle was damaged beyond economical repair.
- [7] Mr Johnson attached the Audatex report to his summary without substantiating the submissions and opinions proffered by him. No reasons were given for his opinion that the plaintiff's vehicle was so severely damaged that it could not be economically repaired. During his testimony, Mr Johnson could not explain how he determined that the plaintiff's

vehicle was a 2011 model as per the Audatex report filed by him, while it is alleged in the particulars of claim that it was a 2010 model.[3] He also stated during his testimony that he was not involved in the salvage of the plaintiff's vehicle and could not provide an opinion regarding the fair and reasonable salvage costs. The notice filed on behalf of the plaintiff's expert falls short of what is required in terms of rule 36(9)(b) of the Uniform Rules of Court.

- [8] Mr Johnson based his expertise not on any qualification but on the fact that he has work experience in the field of assessing motor vehicle damage. Whilst it is true that experts obtain experience in a certain field through various ways, it is questionable that Mr Johnson has the necessary experience or skills to be regarded as an expert in motor vehicle damage. His curriculum vitae shows that he has a matric, worked as a criminal investigator for the South African Police Service, had been a shift supervisor and depot manager and worked as an assessor for Auto and General. He relied heavily on the software programme Audatex to formulate an opinion and could not explain how he reached the conclusion that the plaintiff's

vehicle was beyond economical repair. In cross-examination on this issue he could only say that the insurer instructed him to write the vehicle off.[4]

- [9] In my view, his independence was compromised since he ought to have had an independent opinion based on his examination of the plaintiff's vehicle and not followed the insurer's opinion. It is expected of him as an expert to make a determination based on his own inspection. In fact, Mr Johnson conceded during cross-examination that the general practice in the industry is that a vehicle is deemed to be uneconomical to repair when the costs of the repair exceed the value of 70 per cent of the retail value (incl. VAT) of the vehicle.
- [10] On Mr Johnson's own evidence, the repairs required did not reach the threshold of 70 per cent and the plaintiff's vehicle should not have been regarded as being damaged beyond economical repair. After his testimony there was no clarity regarding the value of the vehicle pre-collision since the particulars of claim refer to a 2010 model and his Audatex report refers to a 2011 model. The plaintiff's case became more onerous when Mr Johnson testified that the report attached to the expert notice and relied on by the plaintiff was not the final report drafted by him. No other report was ever placed before this court by the plaintiff to show the damages suffered.
- [11] Also attached to Mr Johnson's report is a report of Porsche Johannesburg.[5] No evidence was however led by the plaintiff as to the compilation of the report, the author of the report or who conducted the examination of the plaintiff's vehicle by Porsche Centre, Johannesburg.
- [12] This brings me to the evidence of Ms Belinda Botes. Her evidence was that she is employed as a salvage technician at the insurance company Brights, previously known as Zurich. The sum total of her testimony was that she had sold a 2010 Porsche motor vehicle as salvage to Porsche for an amount of R285 000. The insured of the vehicle was a Dr Naidoo and the

vehicle was damaged in a collision and written off as a Code 2. According to her, the costs of repair to a Code 2 are very expensive but the vehicle may still be repaired and used on the road. Codes 3 and 4 vehicles are different and are scrapped from the eNatis system. She could not explain how the amount of R285 000 was derived at, since the letter before court[6] merely showed an amount tendered by Porsche.

- [13] The defendants' expert, Mr Les Simpson's qualifications and expertise are a matter of record. [7] Important to this case is Mr Simpson's evidence that he had wanted to physically inspect the plaintiff's vehicle to give his expert opinion regarding the damaged caused to it. He met with Mr Owen Roberts, the body shop manager at Porsche Centre, Johannesburg to request an examination. After more than a month had lapsed Mr Roberts informed him that the said vehicle had been sold and Porsche Centre, Johannesburg was no longer in possession of the Porsche to be examined. Mr Simpson discovered that the plaintiff's vehicle was still reflected as a roadworthy vehicle on the eNatis system.
- [14] Did the evidence produced by the plaintiff establish the quantum claimed? Earlier in this judgment this court referred to the various methods employed in determining damages suffered. In casu, the plaintiff failed to prove the pre-collision value since insufficient evidence was placed before this court regarding the damage caused to his vehicle and whether it was a 2010 or 2011 model. The post-collision value was also not proved since the plaintiff failed to show that his vehicle was damaged beyond economical repair. Furthermore, the report used by the plaintiff's expert was not the final report on the damages suffered. Clearly, the evidence adduced by the plaintiff did not establish the amount claimed.
- [15] I am mindful of earlier dicta that hold that where there is evidence that damage has been caused then the court ought to make an assessment on the evidence that was placed before it even if the damage cannot be computed exactly.[8] This is also known as the robust approach to the assessment of quantum.[9] The exception to the rule, as I understand it, is that a court is not bound to do an estimate of the damages where evidence is available to prove it; such evidence was not tendered. In this matter the plaintiff had access to a witness employed by Porsche Centre, Johannesburg, Mr Roberts, but elected not to call him. The plaintiff as the owner of the motor vehicle would also have been in a position to identify the vehicle and produce proof of the registration of the vehicle and the model of the vehicle. In casu, it was important to tender expert evidence that shows on a balance of probabilities that the plaintiff's vehicle was damaged beyond economical repair. Mr Johnson's opinion, unfortunately was of a general nature and was of no assistance to this court.
- [16] It cannot be expected of this court to estimate damage under circumstances where the plaintiff failed to place sufficient evidence before this court, which could have enabled it to make an accurate assessment. More importantly, the plaintiff pleaded that his vehicle was damaged beyond economical repair and that is the case that the defendants had to meet.

[17] It is not enough to have shown that damages had been suffered; the onus was on the plaintiff to prove the quantum thereof. In casu the plaintiff did not succeed in discharging his onus on a balance of probabilities.

Order

[18] The following order is issued:

The action is dismissed with costs.

Steyn J

APPEARANCES

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Date of Hearing

: 23 and 24 March 2020

Date of

Judgment

: 08 May 2020

- [1] See para 9.1 of the pleading bundles.
- [2] See *Erasmus v Davis* 1969 (2) SA 1 (A) at 7E-H and *De Jager v Grunder* 1964 (1) SA 446 (A). Also see *Heath v Le Grange* 1974 (2) SA 262 (C); *Ranger v Wykerd & another* 1977 (2) SA 976 (A) at 992C-F and *Toyi v Morrison* 1980 (2) SA 705 (TkS).
- [3] See para 2 of the particulars that reads: ‘At all material times the Plaintiff was the owner, alternatively bore the risk in the motor vehicle bearing registration letters and numbers NJ 34186, a Porsche 911, 2010 model (“the Plaintiff’s motor vehicle”).’ (My emphasis).
- [4] See *Gentiruco AG v Firestone SA (Pty) Ltd* 1972 (1) SA 589 (A) at 616H where the court held: ‘. . .the admissibility of the opinion of a skilled witness is whether or not the Court can receive “appreciable help” from that witness on a particular issue. . . .’
- [5] See Volume 1 at 94 to 104.
- [6] See Volume 2 at 106.
- [7] See Volume 1 at 83 to 86.
- [8] See *Enslin v Meyer* 1960 (4) SA 520 (T) at 523F-G and *Turkstra, Ltd. v Richards* 1926 TPD 276.
- [9] See *Hersman v Shapiro & Co* 1926 TPD 367; *Esso Standard SA (Pty) Ltd v Katz* 1981 (1) SA 964 (A) and *Southern Insurance Association Ltd v Bailey NO* 1984 (1) SA 98 (A).

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