

SOUTH AFRICA / JUDGMENT

RH Johnson Crane Hire (Pty) Ltd v SA Iron & Steel Industrial Corporation Ltd. (207/85) [1987] ZASCA 39 (31 March 1987) [1987] ZASCA 39

COURT

Supreme Court of Appeal

BEFORE

Viljoen, Botha, Smalberger, Vivier, Kumleben

CASE / FILE NUMBER

207/85

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IN THE SUPREME COURT OF SOUTH AFRICA (APPELLATE DIVISION)

In the matter between:

R H JOHNSON CRANE HIRE (PTY) LTD APPELLANT
and
S A IRON & STEEL INDUSTRIAL CORPORATION ... RESPONDENT
LIMITED
CORAM
: VILJOEN, BOTHA, SMALBERGER, VIVIER, JJA et KUMLEBEN,
AJA
HEARD : 24 FEBRUARY 1987 DELIVERED : 31 MARCH
1987

JUDGMENT

VILJOEN, JA

On/

2. On 19 January 1981 three bogies supporting the front end of a Nippon ladle car (referred to in the evidence as a "torpedo") filled with hot metal were derailed at the Iscor works at Vanderbijlpark. To get the bogies and their load back onto the rails the respondent (hereinafter referred to as the de-fendant) hired from the appellant (hereinafter re-ferred to as the plaintiff) one fully hydraulic mobile crane. Whilst the crane's operator was in the process of performing the task of hoisting the bogies with their. load back onto the rails the crane collapsed and was seriously damaged. In the court a quo the plaintiff claimed from the defendant the reasonable cost of repair to restore the crane to the good order and

condition/.....3.condition in which it allegedly was when delivered to the defendant, and loss of rental for the hire of the crane by other prospective customers during the period necessary for the repair and restoration of

the crane. There was some dispute in the court a quo as to whether or not the contract entered into between the parties was a written one which incorporated certain conditions upon which the plaintiff relied. The learned trial judge assumed, without deciding the issue, that the conditions were in fact part of the contract.

On that basis he found, on the evidence led on behalf of the plaintiff (the defendant having closed its case without adducing any evidence), that, in view of the massive overload which the operator of the crane tried to hoist, there were two possible causes for the collapse/

4.collapse of the crane. The breakdown could only have occurred he said, if the computerised load safety device (hereinafter simply referred to as "the device") with which

the crane was equipped, was malfunctioning or if

the operator "by-passed a properly functioning device. The learned trial judge came to the conclusion that

the effective cause of the collapse of the crane

"was that the cut-out mechanism of the safety device

did not function according to the manufacturer's rated capacity and specification and was therefore

not in good working order." Having arrived at that

conclusion the learned Judge did not find it necessary

to deal with the quantum of damages issue and dis-

missed the plaintiff's claim with costs, including

the costs occasioned by the employment of two coun-

sel. With the leave of this court, an application

to the/

5.

to the triai court for leave to appeal having failed, the plaintiff now appeals. In its statement of claim the plaintiff, as was adumbrated above, relied on a written contract concluded on 19 January 1981 in terms of which the defendant took one fully hydraulic mobile crane on hire from the plaintiff which, it alleged, it delivered to the defendant in good order and condition. It was a term upon which the defendant took the crane on hire, the plaintiff averred, that on termination of the hire it would return the crane to the plaintiff in the same good order and condition as it was when delivered. It was further alleged that while the crane was in the possession of the defendant, it

was seriously and extensively damaged, in which condition/ 6.

dition, in breach of its obligation referred to above, the defendant returned the crane to the plaintiff.

Damages as a result of the breach amounting to R590 545,68 were claimed. The written contract relied on was attached to the further particulars as annexure "A". This annexure contains the conditions which are in dispute.

The defendant, presumably because it wished

to avoid the consequences of being bound by the conditions referred to, pleaded that the parties entered into an oral contract in terms of which the defendant hired from the plaintiff a crane which was to have a lift capacity of approximately 200 tons. The contract pleaded included the following terms: that the said crane would be in good working order and

condition/...7. condition, that it would perform in accordance with

the manufacturer's rated capacity and specifications and that the operator to be supplied by the plaintiff

would operate the crane in accordance with such

rated capacity and specifications. The written contract

which the defendant pleaded in the alternative was alleged to contain substantially the same terms.

In breach of the contract, the plea proceeded, the crane supplied was not in good working order, it did not perform in accordance with the manufacturer's rated capacity and specifications or, alternatively, the operator did not operate the crane in accordance with such rated capacity and specifications or in a proper or workmanlike manner. The damage to the crane, it was pleaded, was caused by/ 8. by the breaches. (I take it that what was meant was any one or more of the breaches). To a request by the plaintiff to be furnished with particulars as to the respects in which the crane was not in good working order and malfunctioned, the defendant replied that it was unaware of the respects in which the crane was not in good working order. In proof of the allegation, said the defendant, it relied on the fact that the crane was damaged whilst performing a function which was within its specifications and capacity. Further particulars supplied by the defendant as to the specific respects in which the operator did not operate the crane in accordance with the manufacturer's rated capacity and specifications included averments that the operator, when he operated the crane/

9. crane, exceeded its rated capacity and specifications when he should have realised that he was doing so or, alternatively, that he "by-passed" the device and thus attempted to lift a load in excess of the crane's specifications and capacity. The essence of the allegations in the replication is that the rigger supplied by the defendant failed, in breach of the defendant's undertaking in terms of the contract, in his duty to properly supervise the lifting operation and/or to properly instruct the operator in all matters relative to the operation of the crane other than the actual handling of

the controls and/or that he failed to ensure that the crane was not used and that no attempt was made to use it to lift loads in excess of its capacity and/or

that/

10. that he failed to take the necessary safety measures having regard to the nature of the load to be lifted. The plaintiff denied that the operator was incompetent or that he mishandled the crane. In any event, re-plicated the plaintiff, the operator was, during the operation, in terms of the written contract, the servant of the defendant and if it be found that he did mishandle the crane, he did so in that capacity under the instructions of the rigger concerned and no liability in that regard attached to the plaintiff.

The plaintiff quite correctly based its claim for damages simply on the failure by the defendant to return the crane to the plaintiff in the same good order and condition in which it allegedly was when delivered to the defendant. The contract

in/....

11.

in question was one of locatio conductio. In *Frenkel v Ohlsson's Cape Breweries Ltd* 1909 TS957 Innes CJ said at 962/6:

"In this respect I do not see that the relation existing between the parties differs from that created in a number of other legal transactions - depositum, commodatum, pignus, locatio conductio - which all, though governed by their own rules, have this feature in common, that the custody of an article is entrusted for the time being to a person who is not the owner. In all such cases the depositor, the lender, the pledgor or

the lessor, as the case may be, may (it

seems to me) base his claim for damages

simply upon the refusal or failure of

the custodian to return the article

which he is entitled to demand."

Faced with a claim of this nature the

onus would be on the hirer to establish a

defence. But what defences are open to him?

In *Johnson Crane Hire (Pty) Ltd v Concor Con-*

struction Ltd (unreported WLD 6 July 1983) Margo J said:

"It is settled law that, in the absence of provision to the contrary in the contract,

a lessee/

12.

a lessee is obliged to restore the thing leased in the same condition in which he received it, fair wear and tear excepted, unless the thing has perished or deteriorated or been damaged through causes beyond his control. Voet 19.2.31 (Gane's translation, volume 3, page 446); North Western Hotel Limited v Rolfes Nebel and Co 1902 TS 324 at 334; Frenkel v Ohlsson's Breweries 1909 TS 957 at 962 and Nel v Doble 1966(3) SA 352 (N) at 356 and the authorities there cited."

In my view the phrase "through causes

beyond his control" places, on the face of it, too heavy a burden on the hirer. Voet 19.2.31 is to the following effect:

"Quod si casu fortuito res, circa quam locatio conductio concepta est, perierit, domino perit, nisi alter periculum quoque in se receperit...."

(Gane's translation reads: "But if property in regard to which a letting and hiring has been framed has perished by

chance/

13.

chance accident, it is a loss to its owner. Exceptions are when the other party has taken this risk also upon himself")

That the thing perished as a result of casus fortuitus while in the possession of the lessee or hirer is, however, by no means the only defence which the latter has. He can also escape liability if he proves that the damage did not arise as a result of his own negligence or that of his servants for whose actions he is liable. Circumstances may be conceived under which the hirer could perhaps have prevented the damage by exercising a high degree of control even though he was not negligent. That degree of control, as is suggested in the dictum above, is not required of him. The only onus on him is to prove that

due/ 14. due diligence was exercised by him. See Medallie

and Schiff v Roux 20 SC 438 440; Lituli v Omar

1909 TS 192 194; Parsons v MacDonald 1908 TS 809; Mposelo v Banks 19 SC 370; Nel v Dobie 1966(3) SA

352(N)356 - 359.

For reasons to be furnished in due course I do

not deem it necessary to enter upon the question as to

whether the onus is on the owner to prove, if that

were placed in issue, that he delivered the thing to the lessee or hirer in good order and condition.

As is evident from what I have set out above,

the trial court upheld the defence that the plaintiff failed to deliver the crane to the defendant in good

order and condition and that it was this failure which

caused/ 15. caused the damage. The only issue, at this stage of the matter at least, regarding the condition of the crane when it was delivered to the defendant,

concerns the device. In my view the learned trial

judge erred in finding that it did not function ' according to the manufacturer's rated capacity and

specifications and that the crane was therefore not in good working order. A copy of the Rated Capacity

and Specifications was handed in during the trial

and is attached to the record. In it nothing at all

is said about the device. The document simply contains various illustrations of the crane, notes

regarding its operation and a schedule reflecting

the weights which it can lift with the boom at certain lengths and certain angles from the vertical

position/....16. position.

The only remark relating to the device is to be found in the code of practice for the safe use of cranes (an extract from which was handed in at the

trial). The code contains certain statutory and other

requirements and directions, the non-observance of some of which renders the transgressor liable to be

prosecuted in England, but which, according to the

evidence, are used merely as guide-lines in this country. The code directs that where an automatic safe

load indicator has been fitted it should be inspected at least once a week. This was apparently not done as far as the device was concerned but there is sufficient evidence on record from which a clear inference/ 17. inference may be drawn that there was nothing wrong . with the device itself prior to the commencement of the attempt to lift the torpedo and that only the electric wires connected to the device were damaged when the crane collapsed. When the device was re-installed after the repair of the crane it was tested and it was functioning properly without it being necessary even to calibrate it.

But quite apart from the considerations just mentioned it seems to me that whether the device was in working order before the mishap occurred or not is entirely irrelevant with respect to the condition of the crane. The device was designed to reduce the risk of damage due to human error. It relates, therefore, to the handling of the crane and not to/

18. to the condition of the crane. The human factor is not completely eliminated, though. It is possible for the safety device to be "overridden" by the operator, but that becomes relevant only in the context of possible negligence displayed by the operator, an aspect which I proceed to discuss forthwith.

The case sought to be made by the defendant by cross-examination was that Mkhize, the operator, was either incompetent or that he mishandled the crane by endeavouring to lift too heavy a load in spite of

a clear warning on the dial of the device that he was doing so - which warning he ignored by "by-passing" the device and continuing to attempt to lift a massive overload. In my view the defendant succeeded in its endeavour in this regard. Mkhize was the last witness called for the plaintiff. The plaintiff's witnesses who testified before him on this aspect were agreed that the device could be "by-passed" but/ 19. but their evidence was rather confusing as to the circumstances under which and the purposes for which it was necessary and permissible to do so. This un-clear picture was compounded in large measure by the evidence of Mkhize. I shall, however, convey as best I can the impression I gained from the evidence.

The device itself is a computer mounted in the operator's cabin. Plainly visible on the dial or screen there is a needle which, when the crane is operated, moves from a green into a yellow and from the yellow into a red zone depending on whether the lift is well within the capacity of the crane (the green), still within the capacity but where a certain degree of caution is demanded (the yellow or amber) or/

20. or becomes dangerous (when it enters the red zone).

According to the evidence the controls of the crane "cut out" when the needle reaches the red or danger zone which means that the crane automatically stops functioning. It is not the device which "cuts out". The crane can only resume functioning when the by-pass button is pressed. What the needle does when the

crane or the "controls" cut out is uncertain. It seems logical to accept that, if the device itself functions at all under those circumstances the needle would stay in the red until the weight has been put down and it then returns to green. It is a mystery to me what the effect of the pressing of the reset button is. Presumably it annuls the effect/ 21. effect of the "by-pass" and the controls would once more "cut out" as soon as the needle reaches the red. The "by-pass" becomes necessary and is permissible, as I read the evidence, for the purpose of lowering the weight and putting it down. The operator would in that event be aware that he had been attempting to lift too heavy a load and before the next attempt is made at lifting the load, the weight has to be reduced. What has troubled me somewhat is whether the act of lowering and depositing the load under these circumstances was not itself a manoeuvre fraught with danger, but I assume that there is a reasonable safety margin built into the device and that there is very little risk in proceeding to relieve the crane of the too heavy load as soon as the needle reaches the danger zone and the crane cuts out. There was also evidence, which I mention in passing because it has no relevance to the present case, that when the boom has to be lowered to a horizontal position for the purpose of fitting a fly jib onto/

22.

onto the end of it the crane also cuts out and it is necessary to by-pass the device in order to lift the boom. Apparently no risk is attached to this manoeuvre.

Mkhize was praised in glowing terms as an excellent operator by the plaintiff's witnesses. In so far as the actual mechanical handling of

the crane is concerned, he might have been competent, but judging from his evidence I get the distinct impression that he was not the type of person who was able to display much initiative or who could exercise the necessary discretion in an emergency. The learned trial judge described him as a very nervous and excitable person. While giving evidence he continuously played with his hands, apparently because of his nervous tension, said the learned judge, but he did not think that he was intentionally dishonest. The judge expressed

the/

23. the view that Mkhize was only confused and mentioned two examples of such confusion. He expressed a doubt as to whether, on the occasion in question, Mkhize handled the crane competently. In my own mind there

is more than a doubt. It seems to me that a clear

inference may be drawn from the evidence that he was

negligent. Not only did he press the by-pass button

but he also disregarded the load chart in the cabin.

There are indicia in the evidence that he pressed the

by-pass button not for the purpose of relieving the

crane of an overweight but in an attempt to lift the

weight. From the evidence it may be deduced, in my

view, that, after he had failed the first time to

lift the weight, he overrode the device and made another

attempt/....

24. attempt at lifting the massive overload after the crane had cut out. That much I gather not only from a statement which, according to the witness Vass, he made

to him two days after the mishap but also from his

own evidence.. I quote the relevant paragraphs from

his statement.

"14. The driver was told that the total

weight was approx 400 tons, and that only half the weight was going to be lifted by the crane as the slings were to be placed around one end of the container.

15. The driver was instructed to position

himself approx 5 metres from the 'torpedo' but as he took the load, the ground started to give way under the outriggers.

16. The driver was then instructed to move within approx 3 1/2 metres of the 'torpedo' and to again set the crane ready for lifting, the load being positioned between the outriggers at the side of the crane.

17. The/

25.

17. The Demag crane is equipped with a computer

controlled overload device which automatically disengages the hydraulic control levers governing any lifting operation should the crane reach 85% of its maximum carrying capacity.

18. This overload device is fed into a simple dial which is positioned in the driver's cab. This dial is marked in three colours, green orange and red. As the needle on the dial goes into the red, the hydraulic control levers disengage.

19. When the needle is in the red the driver is able to lower the load only, but is unable to lift the rope or boom or to extend the boom sections.

20. When the needle returns to the orange or green, the driver resets the controls by actuating a reset button positioned adjacent to the dial.

21. Should this reset button be held down then the lifting controls can be used even though the needle is in the red.

22. After setting the crane up in the second position, the driver was instructed to lift the load slowly.

23. As/

26.

23. As the load was lifted off the ground the load indicator needle moved into the red and the overload device cut out the lift controls.

24. Because the 'torpedo' was partially filled with molten metal when it came off the rails, this gradually flowed away from the end which had been lifted resulting in the needle moving out of the red and into the orange.

25. As the needle went into the orange the driver reset the button and continued with the lift.

26. This operation was undertaken three times without any sign of distress to

the crane. While the 'torpedo' was being

held in the air we understand that the

Iskor personnel were placing blocks below

the bogeys and generally tightening the

bolts under the carriage.

27. On the fourth lift the needle again went from the green into the orange, however as it started to go into the red the lift rams ripped off and the boom fell onto the 'torpedo'."

I assume that Mkhize told him what his

conception/

27. conception was as to how the device should be operated and how he in fact operated it. I do not follow what was said in paragraph 19 and 20 of the statement. When the needle enters the red zone the controls stop functioning and the by-pass button has to be

pressed to cause them to function again. In view of evidence given by other witnesses I think paragraph 21 would have been more intelligible if it

read: "Should this by-pass button be held down then

the lifting controls can be used even though the

needle is in the red. " If what Vass understood .

by "reset" means "by-passed" paragraph 25 is

rather significant. Mkhize probably pressed the

by-pass button when the needle went into the

orange or the red and made several attempts to

lift/ 28. lift the torpedo without success. When he tried

for the fourth time, at the same time pressing the by-pass, the lift rams ripped off and the boom

fell onto the torpedo. (I would interpolate paragraph 27 thus). If so read, the version given by Mkhize

as to what happened seems to me to accord with the other evidence about the functioning of the device.

Although he said he had forgotten a great deal of what had happened, Mkhize's own evidence-in-chief accords to some extent with the statement taken down by Vass. He testified as follows:

"Yes, now Alpheus, I do not want to ask you all about your operating, all about your training as an operator by Aaron, I just want to ask you this and listen carefully. If you are lifting a load and the computer indicator goes into the red and the machine cuts out what do you do? It stops.

It/

29. It stops, right, now what do you do?

I tell the people with whom I work that it has stopped.

Yes, and then what do you do with it?

Because it is a load that exceeds the load

that is indicated then it is left. It is what? Yes, because it cannot lift that load. Yes, it cannot lift the load so you have got a load in the air, what do you do with it? We bring it down. Bring it down if it is up?. Yes. Now from your training were you allowed to use the override button in order to continue lifting a load if the computer was already in the red indicating that you had an overload? No." About the instructions given to him by the rigger,

he testified (still in chief):

"MR SCHUTZ : Right, now what did this foreman rigger do? He then showed me the site at which we were supposed to put the crane. Who decided where the crane would stand? The rigger. Who decided how the boom was to be used?

The/

30.

The rigger because he said that the load

was heavy. And who decided on where the slings were to be placed? The rigger too. And who decided when the lift was to commence? The rigger too. Because he was in charge of the crane. Yes, and how did he indicate that the lift was to start? He showed me, he indicated with his hand, he made the sign that I have just been making. The witness has made ... (Court intervenes). COURT : It is a circular sign with his finger. Has made a spiral indication."

Under cross-examination he gave the following

evidence:

" MR JOFFE : If you attempt to lift a weight which is beyond the capacity of the crane, ... Yes? The computer in the crane will prevent you from lifting the weight? Yes. But you can override the computer? Yes.

You/

31.

You would not ever override the computer?

No, I do not have the authority.

And if you did override the computer, you would be a very bad operator? Yes.

And you have been trained never to do that? Yes.

And on this day when the crane broke at Iscor you never overrode the safety device, the computer?
No, I did not.

There was never need for you to override it on that occasion? --- No, I never.

COURT: When you lifted the crane did this

needle ever go towards the red? Yes,

the needle moved to the red and then it came back again a little bit to yellow. I then reset it.

You what? I reset it and put it on so

that it could function again.

MR JOFFE: I thought you said you did not

have to use the overload device?

(Mr Schutz intervenes).

MR SCHUTZ: No, he did not say he used the overload. He said he reset it.

COURT: Yes, /....

32.

COURT: Yes, I do not know what that means.

MR JOFFE: No, it is - did this happen once? Once. Only once? Yes, only once.

COURT: Let me tell you I do not understand what he means when he says "I reset it".

Is that the words, Mr Interpreter?

Reset it.

MR JOFFE: Those are the words. I will come back to that. Now when you say that when the crane broke the needle of the gauge of the com-

puter - it was in green? No.

Well, what (Court intervenes).

COURT: He said it was in yellow.

MR JOFFE: That was the first time, My Lord. What colour was the - where was the needle? At yellow.

But the crane had not yet cut out yet?

No, it does not cut when it is at yellow.

Now when the crane cuts out can you reset

the safety device, the computer? When

the crane resets?

No, no, when the crane cuts out ... (inter-

vention).. /.,.

33.

vention) .. When it is at red you

cannot reset it.

Then what have you got to do? I have said that it moved red and then went and came back again and then it stood at yellow. And then when it - it was when it was at yellow that I reset it again. What did you reset? The computer.

Why did you have to reset it? Because

it was moving back to yellow.

What do you do to reset the computer?

I switch it on. Is that the press-button

switch? Yes.

The one with a picture next to it of a

crane falling over? Yes.

So when the crane was in the yellow, when the dial of the computer was in the yellow,

it was that button that you pressed?

Yes.

And then the crane carried on working? Yes."

The use of the word "reset" in his evidence

and/ 34. and in his statement to Vass puzzles me as much

as it obviously did the learned trial judge. I repeat that I do not appreciate why he had to reset

the device while the needle was apparently functioning

properly by moving from the red back to the yellow and then to the green. I can only surmise that, even though he denied that he did so, he pushed the

by-pass button; otherwise his evidence does not make

sense.

Greater confusion resulted when his counsel in

re-examination endeavoured to urge him into clarifying

matters. From this evidence it appears that he pressed

two buttons, the reset and the by-pass buttons. Why

he had to press both, he does not satisfactorily explain. He testified:

"Now/

35.

"Now Alpheus, I just want you to explain slowly certain movements of this crane. If you are lifting a load and the needle reached the red and the crane stops, .. Yes?

Can you lift further? If it is at that

point then you cannot lift further.

Right, now if it comes - if the needle comes back again into the yellow or into the green, and you want to lift again, what do you do? I reset.

Now how do you reset it, with what do you

reset it? There are buttons, you have

to press on buttons.

Yes, is there a button for resetting?

Those are the buttons I am referring to.

And then the crane will - you can start again?

Now that reset button, is it the same button as the override button or is it a different button? It is just like the other buttons.

Yes, I know. I want to know whether there

is a separate reset button and a separate

override button? They are the same, the

reset button as well as the bypass button are

the same buttons. I do/ 36. I do not want to know whether they look the

same. I say that those are the buttons.

Is there one button or two buttons? Two buttons. A reset button and an override button? You press both on and then reset.

Yes, alright. Apparently in order to reset you have got to press them both? That is

the resetting mode? If you want to reset

it you have to press them both.

But now you know that you sometimes have to use the override button in order to put your

flying jib on? Yes, when you want to -

yes, but at the stage when you want to reset the - want to put your fly jib on, you have got to keep them pressed, you do not leave them out of pressing.

Both pressed? Yes.

COURT: But he says you have got to keep them pressed? Keep them pressed.

MR SCHUTZ: Why do you keep them pressed?

Because when the gauge is on red it does not

move from there. When you have them pressed like that.

COURT: I am sorry, I am a bit confused at the moment. When you say you reset this thing

I first/

37.

I first thought you pressed one button and it was the same button, and now you say there are two buttons, it is the reset button and the bypass button. Do you keep them pressed down all the time or what do you do? These two buttons work together, function together. When you press the button on you are supposed to press them both at the same time. MR SCHUTZ : Mr Interpreter, as he was demonstrating there he pressed the two and he took his hand off, did he not? Yes, when it

is on, you press them then leave. That is when you reset it then you take them off? Yes. Alright, now when you are putting on a flying jib and you want to override the computer, what do you do then? You keep them pressed. You keep them pressed? You keep them pressed. That is vthe way you have been trained? Yes. And it is two different things that you do? Yes." .

The following evidence given by him under cross-examination reveals his attitude in his approach to the task in hand:

"And/

38.

"And I want to put to you that the crane did not have the capacity to lift the weight? It is Iscor that orders the crane."

From what he told Vass it is to be gleaned

that he was told the weight of the torpedo plus bogieswas approximately 400 ton but he was told that thisweight would be reduced to 200 ton in the course of

the lifting process. He knew very well that the

capacity of the crane was 180 ton with the boom at

its smallest angle. As the radius of the lift in-

creased so the lifting capacity of the crane decreased.

According to the rated capacity and speciflcations

the crane had, at 85% capacity, a lifting capacity of

110 ton at a 6 metre radius and 82 ton at an 8 metre

radius. Allowing fully for the fact that as soon as-

39.

the weight was lifted the molten metal would flow

to the other end and the weight would be reducedby half (which would in any event only occur assoon as the lifted end is hoisted higher than theother end) the weight which had to be lifted wás,accordlng to undisputed e.videncs, 191.65 ton which

is, even at 100% capacity, far in excess of the crane's

capclty. There was a load chart in Mkhize's cabin

which reflected the capacity of the crane at the

various radii. The fact that Mkhize attempted to lift a load far in excess of the capacity of the crane renders it all the more probable, (apart from the fact that he admitted having pressed two buttons - one of which must have been the by-pass button). that he did press the by-pass button. In addition

40. the inference may be drawn that he negligently or intentionally disregarded the load chart. In my view he was clearly negligent. Whether this availed the defendant I shall consider in due course.

I have come to the conclusion, however,

that he was not the only negligent person. The crane was ordered by the defendant. Van Rensburg, the plaintiff's employee who manned the hire desk where all the orders were recorded and who noted the order,

could not remember the order specifically. The defendant pleaded that it ordered a crane having a capacity of "about 200 ton". No evidence was led on behalf of the defendant and there was therefore from its side no substantiation of the averment that a crane with that capacity was ordered. The evidence indicated that/....

41.

that the crane concerned was, at the time, the strongest crane available. That the capacity was 180 tons was, according to the evidence, clearly signwritten on the crane. The rigger concerned must, therefore, have been aware of the capacity of the crane. The probability is that the defendant, being in a dilemma because it had to get the bogies back onto the track, ordered the biggest crane that was available and decided to use it regardless of the risk involved. The defendant's servants who were responsible obviously entertained the hope that, in spite of the weight of the torpedo being beyond the capacity of the crane, it would nevertheless accomplish the lift without any mishap. The massive overload which it had to lift turned out to be so

far/ 42. far beyond the capacity of the crane that the breakdown was inevitable.

The English code of practice for the safe

use of cranes to which reference was made abovelists i a the following requirements for a slinger (i e a rigger).

"1.6.2 The slinger should

- (4) have been trained in the general prin-ciples of slinging and to be able to establish weights and judge distances, heights and clearances;
- (7) be capable of directing the movement of the crane and load in such a manner as to ensure the safety of personnel and plant."

There is no evidence that the rigger con-

cerned did not properly direct the movement of the

crane but as I have pointed out, he knew that the

load/ 43. load was heavy and, regard being had to the distance

of the crane from the load to be lifted, he shouldhave realised that the load was clearly beyond thecapacity of the crane.

The final consideration in so far as the

liability is concerned is that, unless I am relieved

from doing so, I shall have to decide whose negligencewas, to use a neutral term, the effective cause of the

damage. If the plaintiff is right in its contention

that Mkhize was, in terms of the contract, the servant

of the defendant, this consideration would indeed re-

lieve me of that duty. It therefore becomes vitaily

important to resolve the issue raised by the defendant

that the terms relied upon by the plaintiff were not

proved/

44.

proved by it to have formed part of the contract. Logically, the first enquiry is whether the terms relied upon did have the effect contended for by

the plaintiff for if they did not it would be unnecessary .

to consider whether they formed part of the contract

or not. I proceed, therefore, to examine the relevant terms and to pronounce thereon.

Although I have dealt with the negligence issue in the context, in so far as the defendant is concerned generally of the duty of the rigger, It is interesting to note that clause 5 of the contract relied upon by the plaintiff provides inter alia:

"The hirer undertakes that he/it will use or permit the crane to be used only in a responsible manner, and he/it will not perform or permit to be performed any lifts beyond the rated capacity and specification "

45.

The terms which are crucial for 'the purposes of determining the liability for the acts of the operator are clauses 10a, 12 and 21a which read:

"10a If the CRANE is supplied with the OWNER'S

OPERATOR (who shall be a competent OPERATOR and licensed where required by law) then while on the SITE the OPERATOR shall be under the sole and absolute control of the HIRER who/ which warrants and undertakes that he/it will give to the OPERATOR clear and specific instructions and directions for all work to be performed by the OPERATOR and the CRANE on the SITE. The HIRER shall be obliged and warrants that he/it will (during the hours that the HIRER requires the CRANE to operate) supervise or provide responsible supervision for the OPERATOR while the CRANE is on the SITE during the period of hire. Notwithstanding anything to the contrary hereinbefore contained, the OWNER shall remain the general employer of the OPERATOR and no obligation shall be placed upon the HIRER to observe the provisions of any statutory laws regulating the relationship between

46. the OWNER and the OPERATOR."

"12 Notwithstanding anything herein con-

tained to the contrary while the CRANE is on SITE, the OWNER shall not be responsible or liable to the HIRER or any other person for any acts on the part of the OWNER'S operator while such operator is carrying out the instructions of the HIRER or any acts or omissions on the part of the HIRER or the HIRER'S operator or for any loss or damage whatsoever occasioned to the HIRER or any other person, property or thing and the HIRER indemnifies and holds harmless the OWNER against all claims of any nature whatsoever for any loss or damage afore-

said including all costs relating to such claims, but this indemnity shall not extend to include an act solely attributable to the OWNER'S operator."

"21a Subject to Clauses 10a and 12 above, the HIRER shall be responsible for all costs and expenses arising from the breakdown, loss of or damage to the CRANE occurring through the HIRER'S negligence, misdirection or misuse, and shall include the

travelling/

47.

travelling time and costs of the OWNER or his/its nominee and time lost and expenses incurred through the CRANE being immobilised or bogged in wet ground, rockfall, subsidence, inundation or the like."

As is apparent from clause 10a it is not specifically provided that the operator is, for the duration of the operation, the servant of the hirer. The word "servant" is not used. The owner of the crane remains the general employer of the operator and it is only for purposes of the work to be performed that he places the operator at the disposal

of the hirer and under the sole and absolute control of the latter. That does not of course mean that the operator would be obliged to slavishly carry out all the rigger's instructions including such instructions as would conflict with the interests of the owner/

48. owner as far as the handling of the crane is concerned. But if he does so, the hirer cannot, in my view, hold the owner liable. On the contrary, he would be liable to the owner. Unfortunately for the

defendant that seems to be exactly what Mkhize did.

He seems to have blindly followed the instructions of the rigger to lift this heavy weight and in the process of doing so his contribution to the mishap was to overtax the capacity of the crane. Clause 12 provides clearly that the owner shall not be responsible or liable to the hirer for any acts on the part of the

owner's operator while such operator is carrying out the instructions of the hirer. Under the circumstances I need not consider what the legal implications would be if the operator operated the crane in defiance of the instructions/

49.

structions of the rigger. Although there was some suggestion under cross-examination that Mkhize left the cab, presumably at a critical stage, he denied it and there was no proof that he in fact did so. In my view the words "negligence, misdirection and misuse of the crane" can appropriately be applied to describe the dereliction of duty of the rigger and in terms of clause 21a the defendant is responsible for all costs and expenses arising from the breakdown' loss or damage to the crane.

Even, therefore, if Mkhize's negligence

contributed to or was the effective cause of the breakdown of the crane, he operated the crane under the sole and absolute control of the defendant's

rigger/

50.

rigger and under his instructions and provided the terms referred to were proved to be part of the contract entered into between the parties the defendant would clearly, in my view, be liable for the '

damage occasioned.

It remains to consider whether the terms

relied on by the plaintiff were proved by it. The

copy of annexure "A" which was attached to the particulars of claim was the "acceptance" copy of the

contract which was referred to on the covering page

as a "Jobbing" contract. According to the evidence

the contracts entered into by the plaintiff with

hirers of cranes were usually completed in triplicate. One copy would remain in the file and the second and third would be handed to the crane driver to be handed/ 51 . handed to the hirer before proceeding with the task at hand. The "acceptance" copy had to be returned to the owner after signature by the hirer. The "acceptance" copy which was annexed to the particulars of claim purported to have emanated from the defendant who accepted the plaintiff's offer in the following terms:

"Dear Sir/s, I/We accept your offer for hire of plant, etc., scheduled at hire rates on the terms noted below and subject to the general conditions endorsed on your offer."

It was signed by one Boshoff on behalf of the defendant and also bears the signature of D van Rensburg on behalf of the plaintiff. This latter signature was appended before the contract was remitted to the defendant. It is not disputed that Boshoff was authorised to sign on behalf of the defendant.

Mkhize was required to hand the two copies comprising the offer and acceptance to the defendant or to somebody on its behalf and according to his evidence he duly did so by handing the two copies to a person at the main gate when he entered the defendant's premises and before he was directed to the spot where the torpedo had been derailed. Only the acceptance copy was before the trial court in the

form of, as I have said, an annexure to plaintiff's particulars of claim. What happened to the copy which the defendant retained has not been disclosed or explained. The terms "noted below" on the acceptance copy included the tariff per hour to be paid, 53.

the minimum charge and an enumeration of certain chargeable items. It also provided as follows:

"Acceptance of this contract signifies your acceptance of these C P H A conditions overleaf on all future hires."

Why provision had to be made for all future hires and not for the hire concerned is not clear. It so happens that according to the evidence

the defendant had previously made use of the plaintiff's cranes but there was no guarantee that it would do so in the future. It appears to be a standard condition which is contained in every one of the plaintiff's contracts. The letters C P H A stand for "Contractor's Plant Hire Association." The plaintiff's witnesses testified that "the general conditions"

referred/ 54. referred to in the acceptance copy included the

C P H A conditions with a few further conditions which the plaintiff added for its own sake and purposes. They further testified that the conditions which the plaintiff attached to the acceptance copy as part of annexure "A" were similar to the general

conditions which were normally attached to the copy which the hirer retained and which were referred to as "the general conditions endorsed on your offer".

During the trial the plaintiff's witnesses handed in the acceptance copy of a specimen of what they said was a standardised form which the plaintiff used when

it entered into contracts with clients. On this copy the words "Contract Basis" appear which differ from/

55. from the words "Jobbing Contract" on annexure "A". It does not, furthermore, contain a notification

from the hirer to the owner that he/they accepted the offer. There are, in addition, other small differences. Defendant's counsel contended that the plaintiff at no stage adduced evidence that the conditions accompanying an offer in respect of a "Contract Basis" contract were identical to those accompanying a "Jobbing" contract. There is, in my view, no merit in this argument. The format of the "front cover", as it was referred to in evidence, might have changed or the plaintiff might have used different front covers but the evidence, which was never refuted, was that the conditions attached to the hirer's copy of the contract, were always the same. These were sub-

stantially/ 56. substantially the so-called C P H A conditions with the few other conditions to which I have referred, added. I have, accordingly, come to the conclusion that the conditions relied upon were properly proved. Counsel were ad idem that if the appeal on the merits succeeded, this Court should itself determine the damages. The damages claimed by plaintiff in the amount of R590 545,68 comprise the following:

(a) The reasonable cost of repairs necessary to restore the crane to its former condition R379 122,38

(b) Loss of rentals for the hire of the crane to other customers during the period necessary for the repair and restoration of the crane to its former condition R211 423,30

R590 545,68 The onus was on the plaintiff to prove its damages. Counsel for the defendant submitted

in/ 57. in general that, even though it was alleged in the pleadings that the parties to the agreement contemplated that the plaintiff would suffer such damages as relate to loss of hire in the event of a breach of the contract by the defendant, such contemplation was not proved. I fail to see what specific evidence was in the present case necessary for such an inferen-

ce other than the circumstances which pervaded the

entire case. It was alleged in the plaintiff's par-

ticulars of claim that the plaintiff "is a company

which carries on the business of hiring plant."

This allegation was admitted. The defendant hired

the crane from the plaintiff at certain "hire rates".

The defendant could not but know and contemplate

that/.....58. that if the crane which earned income for the

plaintiff broke down the plaintiff would suffer damages of the nature claimed. I need say nothing further in this regard.

As a result of the breakdown the crane

was immobilised for the period 19 January 1981 to 13 May 1981. Figures were obtained from invoices

charged out for the crane of the earnings of the

crane during the period March 1980 to 19 January 1981

(the date of breakdown). For the last four months

before the breakdown occurred, namely September,

October, November and December 1980 (January was dis-

regarded because it was not a full month), the agreed

average came to R57 500 per month. This amount

was/ 59. was projected over the period during which the crane

was out of action and after certain deductions were made the figure claimed was arrived at. In the course

of the trial it was conceded by the plaintiff's wit-

nesses that certain further deductions would have to be made. In the submission of counsel for the defendant still further deductions should be made. He submitted, firstly, that a calculation of the average of the earnings over the last four months unduly favoured the plaintiff. Taking the average of ten months' figures would in view of fluctuations over the entire period have been more realistic, urged counsel, which would render an amount considerably less than the calculation referred to. I do not agree. The evidence reveals that after the acquisition of the crane/...60. crane when it was still new and it was not yet generally known that the crane was available, the earnings were low but that they gradually increased. The plaintiff reached the stage when a higher rate could be and was charged for the crane and the last four months' figures reflected a figure which in effect, in my view, favoured the defendant rather than the plaintiff.

A 3,4% deduction in respect of running expenses of the crane and other contingencies was initially, in the computation of the claim, made from the figure of the gross earnings. During the trial this percentage was increased to 15% by the plaintiff. After this increased deduction the figure claimed amounted to R186 034,91. Counsel for .

the/ 61. the defendant argued that a further deduction of 1,8% which the witness Rabinowitz conceded as saving on insurance premiums which were not paid during the repair period should have been made. The 1,8% was indeed conceded but the witness said

that that percentage was included in the 15%. This assertion was an afterthought, counsel put to the witness and submitted in argument to the court a quo and to this Court. I do not agree. The witness Rabinowitz did not specify how the 15% was arrived at but he did say, generally, that that percentage represented the maximum saving while the crane was standing. In any event, 15% in respect of contingencies seems to me to be a generous concession.

Further/

62.

Further concessions were made which reduced the amount claimed in respect of loss of earnings to R179 764,91. These concessions included an amount of R2 778,00 in respect of a saving of labour to the plaintiff while the crane was out of order. Instead of this figure it was suggested on behalf of the defendant that a percentage of 3,5 should be deducted from the gross monthly turnover. I have considered the evidence on this aspect of the case but in my view, without entering into details, the deduction of R2 778,00 suggested by the plaintiff appears to be reasonable.

Another concession made by the plaintiff was that an amount of R3 492 should be deducted in respect/

63. respect of depreciation to which the crane was

not subjected while it was being repaired. Defendant's counsel argued that a much bigger amount should be set-off against the amount of loss of earnings. In their submission the amount which is reflected in the plaintiff's books of account as monthly depre-

ciation should, for the period during which the crane was out of action, be deducted. In my view the

plaintiff's witness Rabinowitz was right in the view

he propounded that the non-use of the crane might

have given it an extra life of a few months and that

he would, for the purposes of calculation of the

amount representing the retarded depreciation, pro-

long the expected life span of the crane by adding

64.

the period of inaction and adjust the depreciation to cover the prolonged period on a reducing balance basis taking into account the inflation factor. After some argument defendant's counsel agreed that that was the right approach and virtually conceded that an amount of R3 492 only should be deducted in this respect.

Another deduction which should, in counsel's submission, be made relates to the period 19 January and 23 January 1981 on which latter date the repair work on the crane commenced and the five days after the completion of the repairs and the commencement of use of the crane. These periods, argued counsel, represented unexplained delays. I do not agree that there were any delays which were unexplained. The crane had to be taken from the Iscor premises at Vanderbijlpark

to/....

65. to the premises of Demag at Boksburg which was commissioned to repair the crane. The crane with the broken boom was driven there. There is evidence that the undercarriage (or the "lorry", as it was referred to) broke down on the way and arrived at Boksburg later than expected. No details of the breakdown were supplied. Whether the breakdown of the undercarriage was unrelated to the collapse of the boom was not investigated. What is more, one assumes that arrangements had to be made between the plaintiff and the defendant, the plaintiff and the insurance company (this being a subrogation matter) and the plaintiff and Demag - arrangements which must have taken some time. These and other circumstances which might have caused a period/ 66.

period of a few days to elapse before the repair work

was put in hand were never properly inquired into during the trial and I did not get the impression when I read the evidence that this delay was a major issue in the court a quo. The five days delay at the end of the repair period was occasioned by the discovery that the lift cylinders had to be replaced because they also were damaged when 'the crane broke down. After the crane had been dismantled the cylinders were sent by Demag to a firm of hydraulic engineers to be examined by them. They reported back that the cylinders were in order but when the crane was reassembled it was ascertained that the pistons did not fit snugly in the cylinders with the result that oil escaped which affected

67. the compression. New cylinders had to be flown

in from Germany which caused a delay of approxima-

tely five days. The defendant should have mitigated

its damages, argued counsel, by avoiding the delay

which could have been achieved if Demag had displayed

proper care. I cannot uphold counsel's argument.

In what respect and to what extent the outside en-

gineering firm was negligent has not been investigated

and Demag acted with due expedition in getting the new cylinders in this country. In the course of

the repair of the extensive damage to a big sop-

histicated machine like the crane in question it would be remarkable if everything went so smoothly as

not to result in a hitch here and there. It has

not/

68. not been shown that Demag acted unreasonably in

its choice of the outside firm to give it a report

on the cylinders nor has it been shown that it

failed to adopt, with the necessary urgency,

remedial measures when it became aware of this

further defect.

The schedule compiled to reflect the

earnings for the period March to December 1980

shows that in a number of instances the rate at

which the crane was hired out was below R200,00

per hour. To this fact the defendant's counsel

linked an argument that another lighter crane

could have been used to do the work concerned.

The plaintiff's witnesses did not and, I deduce,

could/

69. could not say why such a low rate of hire was charged but what they did say was that all the other cranes were fully occupied. There might have been good reasons why the plaintiff was pre-pared to hire the crane out at a lower rate. One such reason which suggests itself is that the weight to be llfted was light but because no other'weaker crane was available the 180 ton crane was used. The schedule shows that for the months September to December 1980 the hiring out of the crane at charges below R200 occurred increasingly less frequently which supports the inference that there was an in-creasing demand for the big crane as time passed. After careful consideration of the argu-

ments/

70. ments addressed to this Court by counsei for the

defendant I have come to the conclusion that an

amount of R179 764,91 should be allowed under the head of loss of earnings.

In so far as the repairs to the crane

are concerned the background must be taken into

consideration. The crane was manufactured by

Mannesmann Demag (hereinafter slmply referred to

as Demag) of Germany. The local branch of Demag

at Boksburg undertook the repairs but was unable

to repair the boom in this country. A complete

breakdown of the items of repalr and the cost

thereof appears in what was referred to as the

Demag file. According to the witness Van der

Mescht/

71. Mescht who was at the time the workshop foreman

at the local Demag branch this file contained a detailed summary of the work undertaken by the local Demag to repair the crane. The file was

compiled by one Schneider, then an employee of Demag, who has since left the Republic permanently and who at the time of the trial was working

for Demag in Germany. The file was compiled by Schneider to demonstrate to the plaintiff and

the insurance assessor, Vass, who represented the insurance company concerned, the necessity and reasonableness of the repairs carried out and the charges therefor. At a late stage in

the trial defendant indicated through its counsel

that/ 72. that, save in three respects, this file was acceptable as proof of the damage and the cost of repairs. The exceptions related to the repairs to the boom,

the replacement of the slew ring and the boom hoist cylinders. These three items comprised the bulk of the plaintiff's claim under this head.

A few days after the damage to the crane one Zimmer, an expert attached to Demag in Germany, arrived in this country and with Schneider, Van der Mescht and other interested persons inspected the damage. It was then decided that the boom could not be repaired in this country and had to be sent to Germany for repairs. The history of the boom hoist cylinders I have related above. During the repairs/

73.

repairs it was found that the slew ring had, due

to the accident, become oval and had to be replaced by a new one which was only obtainable in Germany.

Counsel for the defendant submitted that

the plaintiff advanced no evidence to prove the

precise nature of the repairs, the cost thereof

or that the cost was reasonable. Vass, he argued,

relying on the conclusions of Zimmer and Schneider

simply accepted the overall price which he received

from Germany; he could not exclude the possibility

that parts could have been pirated; he had no way of

satisfying himself that the parts charged for were in

fact used for the repairs; he had no way of satisfying himself

that/ 74. that the parts used were new and he had no personal

knowledge of the labour actually expended in carrying out the repairs on the boom. It is true that Vass was not in Germany where and while the repairs were done, but Vass was, according to the evidence, not

only an experienced assessor but he had considerable

experience in the very field of assessing damage to

cranes. Demag is a big international name as manu-

facturer of cranes and a concern with a high repu-

tation. There is no suggestion that pirate parts :

had been used. Why would a firm which is the manu- '

facturer of the Demag crane use pirate parts if it

manufactured those parts itself? From whom would

it acquire those pirate parts? It is entirely

improbable/ 75. improbable that such a firm would put its own

reputation at stake. Vass was intimately involved with discussions regarding the ways and means of repairing the crane. He was well aware

that there were two policies, one for damage to

the crane and the other for loss of use. He was therefore conscious of the necessity, in the interests of the insurance company which he advised, to balance more expensive methods of repair against the need to have the crane restored as soon as possible. Through negotiation he was able to reduce the amount originally charged by Demag to the amount claimed in/

76.

in the summons.

In regard to the damage to the slew ring it was submitted that Vass could not dispute the significance of a telex addressed by one John Watson of Grenam, England, to Harold Johnson (I assume he is a director of the plaintiff company) setting out certain prices in German marks at which a slew ring and necessary accessories could be obtained from Grenam. It appears that Grenam would itself have had to buy everything from the Demag factory in Germany. The telex concerned is dated 20 July 1981 which suggests that enquiries were made by the plaintiff subsequent to the repair of the crane. This document was disclosed by the plaintiff but under what circumstances and for what/ 77.

what reason the enquiries were made has not been disclosed. Vass said he knew the firm Grenam but he was apparently unaware of the enquiries made by the plaintiff. There is not much difference

between the basic price quoted by Grenam and the account he received from Demag. The difference, he said, was in the "mark-up" of 20%. He objected to the high mark-up and the amount was twice reduced by Demag after repeated objections on his part until eventually they refused to discuss with him a further reduction. His evidence was that even though he thought that the mark-up was somewhat high he still regarded the price as being within the bounds of reasonableness. He had no option, he said, but pay the prices charged by Demag because/

78.

because the parent company, Demag Germany, was the manufacturer and it was logical to entrust the repair work to Demag in this country. The price of the cylinders amounted to R78 552,56. In counsel's submission it was not proved by plaintiff that the new cylinders were necessary and that the cost was reasonable. He pointed out that the engineering concern which was consulted found the cylinders to be usable whereas Schneider found them to be un-usable. There was consequently a conflict of opinion and the person to tell the court about all this was

Schneider/ 79. Schneider and his failure to testify was fatal,

submitted counsel. I do not agree. Van der Mescht

testified in this regard that when the cylinders were tested the desired compression result was not obtained. Van der Mescht said he at first suspected

that the oil seals had not been properly inserted

but after the pistons had been removed and inspected

it was found that the seals were in order. When

the cylinders were measured, it was found that they

had bulged ("gevind die hele silinder het opgeblaas").

It was impossible to repair these cylinders, testi-

fied Van der Mescht. This evidence by Van der Mescht

amply proves that it was necessary to replace the old cylinders. The price which was paid for these cylinders/ 80. linders was not seriously challenged.

I have come to the conclusion that the damages relating to the boom. (R125 189,14), the slew ring (R84 165,10) and the cylinders (R78 552,56) have been adequately proved. In the result the

plaintiff is entitled to damages in the following amounts:

Loss of earnings R179 764,91

Cost of repairs R379 122,38

R558 887,29

The plaintiff has asked for mora interest on this sum at the rate of. 15% p a from the date of judgment of this Court, to which, in my view, it is entitled.

In the result the appeal succeeds, with costs, including the costs occasioned by the employment/

81.

employment of two counsel and the following order

is substituted for the order of the court a quo:

1. Judgment is decreed in favour of the plaintiff in the amount of R558 887,29

with interest on the said amount at the

rate of 15% pa from the date of judgment of this court.

2. Costs of suit including the costs occasioned by the employment of two counsel.

JUDGE OF APPEAL SMALBERGER, JA - agrees

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