

SOUTH AFRICA / JUDGMENT

# Weiss N.O and Another v Atlas Panelbeaters (Pty) Ltd (73425/2013) [2015] ZAGPPHC 1041 (18 December 2015)

[2015] ZAGPPHC 1041

## COURT

North Gauteng High Court, Pretoria

## BEFORE

D S Molefe

## CASE / FILE NUMBER

73425/2013

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IN

THE GAUTENG DIVISION HIGH COURT, PRETORIA

(REPUBLIC

OF SOUTH AFRICA)

Case

Number: 73425/2013

DATE:

08 DECEMBER 2015

In

the matter between:

SUSANNA

MARGARETHA WEISS

N.O.....1st

PLAINTIFF

WERNER

ALEX

WEISS.....2nd

PLAINTIFF

AND

ATLAS

PANELBEATERS (Pty)

LTD.....DEFENDANT

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**JUDGMENT****MOLEFE J**

- [1] The plaintiffs are the trustees of Weiss Seuns Trust ("WST") a trust that operates as a transport business in the conveyance of sand, stones and other aggregates. The plaintiffs instituted a damages claim against the defendant, a panel beater company ("Atlas") in an amount of R402 845, 85 for consequential damages relating to the plaintiffs' Mercedes Actros truck ("the truck") that was involved in an accident.
- [2] The claim is based on a breach of contract in that the defendant failed to properly effect certain repairs to the truck in a workmanlike and efficient manner or at all. The amount of R402 845, 85 represents the reasonable costs of correcting defective repair work done by the defendant and the consequential loss sustained as a result of the fact that the truck could not for a while be used after it had been repaired by the defendant.
- [3] At the commencement of the trial, the parties agreed to proceed only in respect of the issue of liability and that the issue of quantum be separated in terms of Rule 33 (4) and to be postponed sine die which order was granted.
- [4] The plaintiffs allege that the truck was taken to the defendant for the defendant to issue a quotation for repairing the truck. Then it is alleged that the parties orally agreed that the defendant would repair the truck and that the repairs would be done in a workmanlike manner; that the plaintiffs would pay the excess payable in terms of its insurance policy and that the insurance company would pay the balance. It is alleged by the plaintiffs that when the vehicle was returned to the plaintiffs after the repairs it was in a defective condition causing inter alia vibrations and the leaking of oil.
- [5] The defendant admits the agreement but alleges that the agreement was entered between the plaintiffs' insurers and not with the plaintiffs. The defendant denies that it failed to do the repairs on the truck properly and alleges that the repairs were done in accordance with the insurer's mandate.
- [6] The defendant filed a counterclaim against the plaintiffs for costs of "certain repairs" done to the truck during June
- 2013. The defendant led no evidence in respect of the counterclaim and abandoned it at the end of the trial. The counterclaim is therefore dismissed with costs.
- [7] The following facts are common cause:
  - 7.1 After repairs were done to the truck, it was vibrating and presented with instability;
  - 7.2 The rear propshaft was mal-aligned;
  - 7.3 The engine ceased after its return from Atlas who had it repaired;

7.4 The truck slipped/jumped out of gear after the gearbox was refitted;

7.5 An employee of Atlas cut holes into the 5th wheel chassis rail rendering the vehicle extremely unsafe;

7.6 The vibration/instability was resolved after the plaintiffs had the truck repaired properly by Vossies Propshafts CC and Performance Engineering (Pty) Ltd and the truck is to this day in good working condition.

#### Plaintiffs' Evidence

[8] The plaintiff called Mr Werner Weiss, the second plaintiff Mr Klasie Uys and Mr Vernon Botha to testify on its behalf.

8.1 Mr Werner Weiss ("Weiss") testified that on 29 April 2013, he received a call from his technician advising him that the truck driver accidentally drove into a ditch and the truck was damaged. He advised the technician that he would

arrange a towing service to take the truck to Atlas. He spoke to Sakkie van Zyl at Atlas and informed him that the truck was on its way and that a quotation for repairs should be prepared. A damage report[1] (quotation) from Atlas dated 30 April 2013 was furnished to Weiss. In light of the costs involved as reflected in the damage report, the plaintiffs, on 24 June 2013, elected to institute an insurance claim. The insurer's assessor, Mr Bryn Anderson authorized the repairs after the assessment of damages.

After the defendant had repaired the truck, it had a vibration problem and shortly after it was returned to the plaintiffs, its engine ceased. The plaintiffs fetched it from Mercedes Benz where it had been taken by the defendant and took it to Dekra (AA) for a general examination. The plaintiffs thereafter took it to Vossies Propshafts CC and to Precision Engineering (Pty) Ltd for repairs and all the problems which were reportedly repaired by Atlas were resolved.

8.2 Mr Klasie Uys testified as an expert witness and testified that he is a qualified diesel mechanic (N3) and was a technician at Dekra (AA) with an experience as a diesel mechanic since 1972. He was requested by the plaintiffs to conduct a general examination on the truck and after the inspection of the truck, he prepared a technical examination report.

According to Uys's testimony, the truck presented with a multiplicity of defects, the most important of which was the rear propshaft which mal-aligned and caused instability and vibrations to the truck.

This in his view does not illustrate workmanship of an acceptable technical standard which caused the consequential damages. Mr Uys conceded that some of the faults found in the truck were maintenance related.

8.3 Mr Werner Botha, testified as an expert witness and gave particulars of his expertise. He testified that he is the Chief Executive Officer and Manager Operations of Performance Precision Engineering (Pty) Ltd, a company specializing in automotive engineering applications. He was requested by the second plaintiff to work on the truck as it had a smoking problem. After the inspection of the truck, he found that the fourth piston sleeve, the conrod as well as the big-end bearings caused the engine to cease; the very

piston reportedly replaced as new by defendant's sub-contractor Mnandi Transport CC. Botha opined that both the oil rings and compression rings on the piston were not replaced.

Botha testified that he personally attended to the truck engine and prepared a report indicating that the number 4 piston ceased into the number 4 piston liner. This was caused by the oil bypassing the rings, entering the intake and the piston liner assembly that failed into the liner. I have noted that Botha's report stands unchallenged by the defendant.

8.4 Mr Janus Grobelaar testified that he is employed as a technician by the plaintiffs and that on 16 July 2013 he collected the truck from Cargo Mercedes Benz where it had been taken by the defendant. The truck was vibrating and slipping out of gear, the shocks were leaking and the 5th wheel chassis rail had 2 holes cut on it. Grobelaar testified that before fetching the truck he signed a

clearance certificate on which he wrote in his own handwriting "not satisfied with vehicle, taking it to AA for second opinion "

That concluded the evidence on behalf of the plaintiff.

[9] After the plaintiff had closed its case, the defendant elected to bring an application for absolution of the instance. The correct approach to an absolution at the end of a plaintiff's case was stated by Harms JA in *Gordon Lloyd Page & Associates v Riviera* 2001 (1) SA 88 (SCA) at 92 - 93:

*"The test for absolution to be applied by a trial court at the end of a plaintiff's case was formulated in Claude Neon Lights (SA) Ltd v Adelson (2) 1958*

(4) SA 307 (T):

.... (W)hen absolution from the instance is sought at the close of plaintiff's case, the test to be applied is not whether the evidence led by plaintiff establishes what would finally be required to be established, but whether there is evidence upon which a court, applying its mind reasonably to such evidence, could or might (not should, nor ought to) find for the plaintiff. This implies that a plaintiff has to make out a prima facie case - in the sense that there is evidence relating to all elements of the claim - to survive absolution because without such evidence no court could find for the plaintiff. (*Marine & Trade Insurance Co Ltd v van der Schyff* 1972 (1) SA 26 (A) at 37G-38A)". The application failed and was dismissed as I was satisfied that the plaintiffs at the end of their case had presented sufficient evidence upon which a reasonable man could find in its favour[2].

## Defendant's Evidence

9.1 Mr Arnold Swartz testified that he is the owner and workshop manager at Atlas Panelbeaters (Pty) Ltd. Atlas is also a Mercedes Benz approved repairers. Swartz testified that he contracted with the plaintiffs' insurers (Absa insurers) to effect accident related repairs to the truck and did not contract with the plaintiff. He was instructed by the insurer's assessor, Mr Bryn Anderson to repair the truck as authorized by the assessor. He denied any poor workmanship on the repairs done save to concede that one of Atlas employees made a mistake by cutting holes on the 5th wheel chassis rails of the truck using a cutting torch and this was unacceptable.

Swartz conceded that the defects above-mentioned in paragraph 7 are unacceptable and that he does not usually release vehicles in that condition. He also conceded that the rear propshaft was not properly aligned and that there was no report that the truck jumped out of gear prior to Atlas and Mnandi Transport working on it.

9.2 Mr Koos du Toit, testified that he is the owner / member of Mnandi Transport CC and is sub-contracted to the defendant. He testified that work was done on the truck in a proper and workmanlike manner as documented[3]. He confirmed in his testimony that the truck engine they worked on ceased shortly after the truck was released and attributed that to overheating caused by not enough water around the sleeve piston. Du toit conceded that he is not present at his workshop at all times and that he did not oversee the work done on the truck by his employees.

9.3 Mr Miles Osbourne testified that he is the owner / member of Central Propshafts & CV Joints CC and sub-contracted to the defendant. Osbourne testified that he re-conditioned the truck's propshaft in a proper manner. He contradicted Swartz's testimony that the propshaft was mal-aligned. He conceded that he personally did not work on the engine but attempted to later attest in his evidence that he saw its fitment.

9.4 Mr Mornay Kannemeyer testified that he is employed by the defendant as a stripper and assembler. He testified that whilst working on the truck he mistakenly cut holes on the 5th wheel chassis rail with a cutting torch in order to obtain a proper fit.

9.5 Mr Bryn Anderson testified that he is the assessor appointed by Absa insurers and that he assessed and authorized the accident related damages on the truck to be repaired by the defendant. He confirmed that had the plaintiffs not elected to utilize their insurance cover, he would not have been involved in this matter.

That concluded the evidence on behalf of the defendant.

[10] The issues to be determined by this court are whether a contractual agreement was reached between the plaintiffs and the defendant and whether the defendant failed to properly execute the repairs for which it was contracted.

[11] Although the defendant denies the existence of any contractual agreement with the plaintiffs, this was not pleaded nor raised by a special plea. Plaintiff's counsel[4] contends that even if a misjoinder defence was raised by the defendant in a special plea, it would have failed on the following

grounds:

(i) the plaintiffs themselves elected to send the truck to Atlas for repairs after the accident;

(ii) the plaintiffs, had they elected to do so, could have proceeded with Atlas repairing the truck without relying on their insurance cover and the costs of the repairs would have been borne by WST.

[12] Defendant's counsel[5] argued that the plaintiffs subrogated all their rights to their insurers and that the defendant is only liable to the plaintiffs

insurer, but not to the insured or the plaintiffs.

[13] I do not agree with the argument by the defendant's counsel. In my view, the principle of subrogation is not applicable in this case. An insurer would become entitled to a cession of rights of the insured vis-a-vis any third party after the insurer had indemnified the insured in respect of an occurrence covered by the insurance policy and all such rights would become subrogated to the insurer. (My own emphasis)

[14] In a similar case of *Visser v Incorporated General Insurance Limited* 1994 (1) SA (472), Mahomed J postulated that a claim against a third party for the consequential damages and the amount received was not in respect of any damages against which the respondent (the insurance company) had indemnified the appellant (the insured) in terms of the relevant contract of insurance, but other damages which the insured suffered in consequence of his inability to use a vehicle in his business and in respect of additional fuel costs.

Mahomed J quoted from *South British Insurance Co v Union Government (Minister of Finance)* 1914 CPD 822:

*"This passage if it correctly lays down the English law seems to show that two actions could be brought against the wrongdoer separately, one for the amount paid under the policy of the company, and another by the owner of the property insured for damages not covered by the policy —. The causes of action appear to me to be different though arising out of one set of circumstances"*

[15] In casu, the plaintiffs (the insured) brought a claim against the defendant for costs of correcting the defective repair work done by the defendant on the truck. The insurer and the plaintiffs were provided with a quotation and the repairs were undertaken under the condition that the plaintiffs will pay the excess amount and the insurer the balance of the accident related repair costs. It is clear on the evidence before court that there was an agreement between the defendant and the insurer to repair damages covered by the contract of insurance. Other consequential damages arising from the defendant's failure to properly execute the repairs for which he was contracted and which consequential damages

are not covered by the insurance contract, are not subrogated to the insurer.

[16] It is common cause that after the defendant had repaired the truck, the rear propshaft was mal-aligned, causing it to run at an unacceptable angle, damaging the oil seals and causing oil leakage which subsequently caused the engine to cease.

On 11 July 2013, when plaintiffs' technician went to collect the truck from the defendant, he was told that the truck was not ready. When he finally fetched the vehicle on 16 July 2013, he experienced serious vibrations and the truck was slipping out of gear, which problems were never experienced before. I am satisfied that based on the evidence, the defendant failed to properly execute the repairs to the truck. The consequential damages emanate from the sub-standard work done on the truck by the defendant during the initial repairs. In my view, the plaintiffs provided sufficient evidence of the plaintiffs' consequential damages.

[17] Furthermore, the policy schedule makes no provision for insurance cover for consequential damages upon which the defendant can rely for its defence. The defendant has, in my view, failed to formulate the terms of the insurance cover which it seeks to rely on for purpose of its reliance on the subrogation principle. There is no *fit* whatsoever, between the defendant and the plaintiffs' insurers in respect of the consequential damages suffered by the plaintiffs.

[18] I accordingly make the following order:

1. The defendant is liable for all proven or agreed damages suffered by the plaintiffs as a result of the defendant's breach of the agreement to effect the required repairs to the plaintiffs' Mercedes Benz truck with registration numbers HLK 640 NW;
2. The quantum portion of the plaintiffs' claim is postponed *sine die*;
3. The defendant's counterclaim is dismissed with costs;
4. The defendant to pay the plaintiffs' taxed or agreed party and party costs on the High Court scale.

Draft Order marked "X" is hereby made an order of court.

D S MOLEFE

JUDGE OF THE HIGH COURT

APPEARANCES:

Counsel on behalf of Plaintiff Adv. R Ferguson

Instructed by

Adams & Adams Attorneys

Counsel on behalf of Defendant Adv. A Knoetze

Instructed by

Pearson Attorneys

Date head

17,18,19 & 20 November 2015

Date delivered 08 December 2015

IN THE HIGH COURT OF SOUTH AFRICA (GAUTENG DIVISION. PRETORIA)

HELD AT PRETORIA ON THIS THE DAY OF

COURT 4C BEFORE THE HONOURABLE JUSTICE MOLEFE (J)

CASE NR: 2013/73425

In the matter between:

SUSANNA MARGARETHA WEISS NO.....First Plaintiff

WERNER ALEX WEISS.....Second Plaintiff

And

ATLAS PANELBEATERS (PTY) LIMITED.....Defendant

DRAFT ORDER OF COURT

HAVING HEARD COUNSEL for the Plaintiffs and the Defendant:

THE COURT GRANTS JUDGEMENT in favour of the Plaintiffs against the

Defendant in the following terms: -

1. That the quantum portion of the plaintiffs' claim is postponed sine dies.
2. The Defendant is liable for all proven or agreed damages suffered by the plaintiffs as a result of the defendant's breach of the agreement to effect the required repairs to the plaintiff's Mercedes Benz Actos truck with registration number HLK 640 NW.
3. The defendant's counterclaim is dismissed with costs.
4. The Defendant must make payment of the Plaintiffs' taxed or agreed party and party costs on the High Court scale which costs shall include the following: -
  - 4.1 The fees of Senior - Junior Counsel on the High Court Scale, inclusive but not limited to Counsel's full reasonable day fees for 12, 17, 18 19 and 20 November 2015 and the reasonable costs of preparation of the Heads of Argument;
  - 4.2 The reasonable taxable costs of obtaining all expert evidence which were furnished to the Defendant;

4.3 The reasonable costs of all consultations and travelling costs between the Plaintiffs' counsel, the Plaintiffs, and the Plaintiffs' attorney and witnesses in preparation for the hearing;

4.4 The above costs will also be paid into the aforementioned trust account.

5. The following provisions will apply with regards to the determination of the aforementioned taxed or agreed costs:-

4.1 The Plaintiffs' shall serve the notice of taxation on the Defendant's attorney of record;

4.2 The Plaintiffs' shall allow the Defendant 7 (SEVEN) court days to make payment of the taxed costs from date of settlement or taxation thereof;

4.3 Should payment not be effected timeously, Plaintiffs will be entitled to recover interest at the rate of 9.0% per annum on the taxed or agreed costs from date of allocatur to date of final payment.

BY ORDER OF THE COURT

[1] Bundle: Documents p5

[2] Gayscone v Fall and Hunter 1917 (TPD) 170

[3] Bundle Index: Documentation page 7-9

[4] Advocate R Ferguson

[5] Advocate A Knoetze

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