

Not reportable
In the High Court of South Africa
(South Eastern Cape Local Division)
(Port Elizabeth High Court)

Case No 718/07
Delivered:

In the matter between

JOHN GABRIEL KLOPPER T/A JK STRUCTURES

Plaintiff

and

BURRIS LANCE CC T/A PROTEC SERVICES

Defendant

SUMMARY: Contract for the conveyance by a public carrier of a 17·5 ton excavator by road – excavator damaged in transit while being driven beneath an overhead bridge on a national road – damage caused by the carrier's driver's negligence – carrier liable for damages for breach of contract.

JUDGMENT

JONES J:

[1] This is an action for damages for breach of contract. The defendant is a public carrier. In September 2004 it entered into an agreement with the plaintiff for the conveyance of the plaintiff's 17·5 ton Daewoo S175 LC-W excavator by road from a construction site in Blue Water Bay in Port Elizabeth to King William's Town. The conveyance was by means of a mechanical horse towing a large flat bed trailer upon which the excavator was mounted.

[2] It is common cause that on 10 September 2004, whilst the excavator was being conveyed on the trailer in terms of the agreement, it collided with an overhead bridge on the N2 on the outskirts of Port Elizabeth. It is also common cause that the excavator was damaged in the collision, that the plaintiff suffered loss in consequence, and that the quantum of his damages is R152 121·58. At issue between the parties is whether the defendant was in

breach of contract and is liable for this loss, or whether the damage was entirely the result of the fault of the plaintiff himself, who must therefore bear his own loss.

[3] The parameters of the disputed issue are set out in the pleadings. In summary, the plaintiff has pleaded that in terms of the contract the defendant was under a duty to transport the excavator with the reasonable skill and care expected of a public carrier and transporter of goods, and that the defendant would be liable for any damages suffered by the plaintiff as a result of damage to the excavator which was caused in transit by the negligence of the defendant's driver acting in the scope of his employment. The plaintiff pleaded further that the collision with the overhead bridge was caused by the negligence of the defendant's driver, *inter alia*, in the loading of the excavator and in driving it beneath the bridge without ensuring that he could do so with safety. This is denied by the defendant. It made the counter-allegation that one of the plaintiff's employees, the excavator's operator one Mnyando, was responsible for loading the excavator on to the flat bed trailer and ensuring that it was safely loaded so as to pass under overhead obstructions, and that the damage was caused by his negligent failure to do so.

[4] The defendant's plea also alleged contributory negligence by the plaintiff's employee acting in the scope of his employment and raised the alternative defence of an apportionment of damages. But it has not persisted

with this in view of the decision in *Thoroughbred Breeders' Association v Price Waterhouse* 2001 (4) SA 551 (SCA), which holds that the Apportionment of Damages Act No 34 of 1956 is not, as matter of law, applicable to cases of damages for breach of contract.

[5] By the time the parties came to trial the issues had been curtailed significantly by agreement. By reason of admissions in the pleadings and the contents of the minute of the pre-trial conference the sole issue on trial was the cause of the damage. There were two witnesses. The plaintiff testified on his own behalf, and the defendant's driver, one Botha, was called by the defendant. The operator of the excavator, Mnyando, who drove the excavator on to the flat bed trailer and who was a passenger in the mechanical horse when the excavator collided with the overhead bridge, has since died and his version of the events is not before the court.

[6] The incidence of the onus of proof to an extent also curtails the issues. The law places the onus on a public carrier to show on a balance of probability that damage to the goods that he agreed to transport and which occurred in transit was not attributable to *dolus* or *culpa* on his part (*Stocks & Stocks (Pty) Ltd v T J Daly & Sons (Pty) Ltd* 1979 (3) SA 754 (A) 760 *in fine* – 761F). There was no onus on the plaintiff to prove negligence. The onus was squarely on the defendant. It attempted to discharge it by proving that the sole and exclusive cause of the damage was the negligence of the operator of the

excavator in improperly positioning the excavator on the flat bed trailer. I am satisfied on the evidence that he failed. In my judgment, the evidence shows not only that the defendant's driver was negligent in not ensuring that the excavator was safely loaded on to the trailer after it had been driven on to the trailer by its operator. He was also negligent (a) in driving the horse and trailer with its cargo on board *en route* to King William's Town knowing that the cargo was not properly loaded, and (b) in driving underneath the overhead bridge without ensuring that he could do so with safety. Measured against the standard of care expected of a public carrier to his client, this amounted in the circumstances to a negligent breach of its obligations under the contract which caused the plaintiff to suffer damage and consequent damages. The defendant is liable for those damages.

[7] In view of the onus and the nature of the defence, the evidence concentrated largely on the loading of the excavator on to the flat bed trailer. The plaintiff is a civil engineering contractor who was qualified as an expert witness. He has experience not only in carrying out the civil engineering and construction work of road and bridge building; he also hires engineering equipment like excavators to other engineering contractors. These machines cannot usually be driven on a public road and must be conveyed by vehicle to the site of the works where they are to be used. The plaintiff was not present when this excavator was loaded, but he is qualified to give evidence on how an excavator should be loaded on to the transport vehicle. He did so. To load it safely it should be positioned on the trailer with its crane-like boom and the

excavation 'bucket' at the end of boom extending backwards from the mechanical horse towards the rear of the trailer. In this position the boom can be lowered so that its topmost portion is at its lowest possible level above the ground, with the bucket (for holding excavated material) resting on the floor of the trailer. If it is loaded the other way round, this cannot be achieved, with the consequence that the bucket rests higher up on the trailer and top of the boom is at a correspondingly higher level above the ground. The plaintiff arrived at the scene of the collision shortly afterwards. The horse and trailer combination with its cargo was still at the scene. It had completely passed through the bridge. It was apparent that the highest portion of the excavator above the ground had collided with the bottom of the overhead bridge, but had been pushed down and was, by reason of its angle, able thereafter to pass beneath it. The excavator was still firmly secured to the flat bed trailer. It had been loaded the wrong way round, with its boom and the excavation bucket extending forwards towards the mechanical horse. Its topmost portion was significantly higher than it would have been if it had been properly loaded the other way round. The plaintiff expressed the expert opinion that it was the responsibility of the carrier to see to it that the machinery was safely positioned and secured on to the vehicle which was to convey it before it proceeded on its way. It was accepted that the excavator would have passed safely under the overhead bridge if its boom had been facing the other way.

[8] The only other witness was the defendant's driver, Botha. He is not qualified to drive the excavator. The plaintiff's operator, Mnyando was

required to do so. This was standard procedure, the plaintiff's opinion being that he would do so under the direction of the carrier, whose duty it was to see to it that the excavator was properly and safely positioned on the trailer, and then securely chained down. Botha testified that Mnyando manipulated the excavator on to the trailer, and left it in a position with the boom facing forwards. In his experience this was the wrong way round. He attempted to remonstrate with Mnyando on a number of occasions in an attempt to get him to face the excavator the right way round. On the third occasion, he said, Mnyando became impatient with him and told him that he had loaded many excavators for conveyance, that he knew what he was doing, and that he was not prepared to get up and change the position of the excavator on the trailer.

[9] Botha said that he did not want to become embroiled in an argument with the servant of a client of his firm. He decided to leave things as they were, on the understanding that Mnyando would accept responsibility if anything went wrong. Mnyando gave him an undertaking to that effect. He then made sure that the excavator was securely chained down on to the trailer, and decided to set off for King William's Town. He chose the obvious route out of Port Elizabeth, which was from Blue Water Bay on to the N2 which proceeds northwards along the coast out of the city and becomes the national road to King William's Town via Grahamstown.

[10] The overhead bridge where the collision occurred was no more than about 2 kilometres from where Botha had set out in Blue Water Bay. Botha

knew that it lay ahead of him, he knew that it had a clearance of about 5 metres, and he knew that he would have to pass beneath it unless he circumvented it by taking the off ramp to Markham Township which was situated at the overhead bridge, and then taking the on ramp back on to the N2 immediately beyond the bridge. He chose not to do so. It was a fine clear day. The bridge was patently visible for at least 500 metres as he approached it. He had plenty of time to assess its clearance in relation to his load, and he had plenty of room to pull off the road on to the yellow shoulder or the extensive grassy verge to his left if there was any doubt in his mind about being able to pass safely beneath it. He acknowledged that he had not measured the distance from the top portion of the excavator's boom to the ground. He did not know whether it was more than 5 metres. He therefore did not know for sure whether he would be able to pass under the overhead bridge without damage to the top portion of the boom. He nevertheless decided to drive underneath the bridge. He did so despite his misgivings about the way in which the excavator had been loaded, with its boom obviously in a position higher than it would have been if it had been properly positioned to face backwards. He did so without having satisfied himself that the large and heavy piece of machinery on the back of his trailer could pass safely beneath the bridge. As an experienced driver and carrier of large, heavy road-building machinery he should have realised from his observation that the highest point of the boom was in the vicinity of about 5 metres from the ground. In these circumstances there can be no doubt about the most probable inference from the known facts – and that is that he failed to

exercise the care required in the circumstances by the reasonable standards to be expected of the profession of public carriers of heavy machinery. I cannot imagine any reputable public carrier of heavy machinery suggesting otherwise. The inference of negligence on Botha's part is inescapable. He negligently took the decision to drive off knowing that his load was not loaded in accordance with standard safety procedures, and he drove underneath the overhead bridge without ensuring that he could do so with safety. The defendant has not displaced the inference of negligence which arises from his conduct.

[11] Mr *Mullins* argued that the conclusion of negligence is excluded by the fact that the excavator nearly passed beneath the bridge without colliding with it, which is indicative of the care taken by Botha in driving through it. This submission is without substance. To suggest that a professional driver in the employ of a public carrier is in these circumstances merely made an error of judgment is in my opinion only to be stated to be rejected. A careful driver would see to it that there was plenty of clearance before deciding to drive through. He would not take a chance that there may be a few centimetres to spare. It is in any event not correct to suggest that the excavator nearly made it beneath the bridge, and did no more than scrape its top on the way through. According to the plaintiff, the top of the excavator must have protruded about 50 or 60 millimetres, if not more, above the bottom of the bridge. It ripped a sizable portion of reinforced concrete about 600 millimetres in length out of the bottom portion of the bridge on its way through, before the boom was

pushed downward by the force of the impact and its angle. The impact was sufficiently forceful and loud for Botha to have been aware of it above the noise of his engine. The plaintiff described the damage to the excavator, which was not only to the boom, parts of which required replacement, but which also extended to other parts of the excavator as well. In my opinion, the defendant failed to displace the inference of negligence by showing that Botha's conduct was merely an error of judgment.

[12] The main thrust of Mr *Mullin's* argument was that on the facts the plaintiff's excavator operator took full responsibility for loading the excavator on to the trailer, and, that because he had done so, the defendant was absolved of its ordinary contractual duty to do so. In my opinion, this argument cannot succeed. In the first place this is not a case of a defendant contracting out of liability by an exclusion or limitation of liability clause or an owner's risk clause in his contract. Although the operator Mnyando is alleged to have stated that he accepted responsibility for the way in which the excavator was loaded, this cannot amount to a term of the contract. The defendant has not pleaded such a term (on the contrary, the terms of the contract as pleaded by the plaintiff were admitted); it was not the case the plaintiff was called upon to meet; it was not one of the issues canvassed at the hearing; and there is no evidence that Mnyando was authorized to enter into a binding agreement of this nature, especially one which excluded an important common law incidence of the contract of carriage of goods.

[13] Mr *Mullins* was aware of this. His proposition was not based on any alleged term of the contract. Instead, it was that the conduct and the statement of the operator of the excavator was part of the factual complex which in the circumstances and if found to be proved operated to exonerate the carrier from its duty to supervise the loading of the excavator. It shows, he argued, that the defendant was therefore not negligent. In my view, this proposition is without merit. The plaintiff's evidence was that part of the carrier's duty is to ensure that his cargo is properly loaded. Not only was his expert opinion not challenged or contradicted by other evidence. It also accords with common sense. The carrier performs skilled professional services for his client. Part of his skill as a carrier is to load the cargo properly so that its weight is safely distributed on the trailer and so that it is in the best position to be secured properly. That is part of the reason for employing him as an independent contractor. It stands to reason, therefore, that the carrier's contractual duty is to oversee the actions of the operator in putting the excavator on to the trailer and in manipulating it into position on the trailer. At the end of the exercise it is the carrier who must be satisfied that the cargo is correctly loaded. In my view, a carrier fails in his duty to his client if he abrogates this duty to an operator of the excavator, especially to one who is not an expert in carriage and haulage. He cannot do what was done in this case: he cannot simply accept what the operator says and does when he knows that this is incorrect and unsafe. In the circumstances of this case Botha could and should have insisted that the excavator was loaded facing the correct way. In the face of lack of co-operation he could and should at

least have contacted his principal by telephone to obtain proper instructions. Instead, he took a deliberate decision to drive his cargo on a public road, knowing that it was improperly loaded, knowing that it was higher than it should have been above the ground, and knowing that he would have to proceed beneath an overhead bridge. In my view this decision was as negligent as his decision to drive beneath the bridge when he got to it. But even if I am wrong in attributing fault to Botha in the loading of the excavator, and even if this was solely attributable to Mnyando, the defendant has not shown that it was the sole cause of the damage. Botha's negligence in driving beneath the overhead bridge was also a proximate and foreseeable cause of the damage.

[14] In the result the defendant is a public carrier 'in the position of a depositary or bailee for reward, who is under a duty to exercise reasonable care in regard to the goods entrusted to him for conveyance and who, in the event of the goods being damaged or destroyed, is liable in damages to the owner thereof unless he can show that the damage or destruction occurred without *culpa* or *dolus* on his part' (per Corbett JA as he then was in *Stocks & Stocks (Pty) Ltd v T J Daly & Sons (Pty) Ltd supra* at 761A). The defendant has not been able to show that the damage to the excavator was not due to *culpa* on its part. It is therefore liable in damages to the plaintiff.

(15) There will be judgment for the plaintiff in the sum of R152 121-58, with

interest at the prescribed rate from a date 14 days from the date of judgment, and costs of suit with interest thereon at the prescribed rate from a date 14 days from the date of the taxing master's *allocatur*. The costs will include the costs of the photographs, the costs of an inspection *in loco*, and the qualifying fees, if any, of the plaintiff and D van der Poel. The plaintiff is declared a necessary witness.

RJW JONES
Judge of the High Court
16 May 2008

FORM A
FILING SHEET FOR SOUTH EASTERN CAPE LOCAL DIVISION
JUDGMENT

PARTIES: **JOHN GABRIEL KLOPPER t/a JK STRUCTURES**

and

BURRIS LANCE CC t/a PROTEC SERVICES

a) Registrar: **718/07**

b) High Court: **SOUTH EASTERN CAPE LOCAL DIVISION**

DATE HEARD: **15/05/08**

DATE DELIVERED: **22/05/08**

JUDGE(S): **JONES J,**

LEGAL REPRESENTATIVES -

Appearances:

- 1. for the Plaintiff(s): **ADV: J.J. Nepgen**
- 2. for the Defendant(s): **ADV: N.J. Mullins**

Instructing attorneys:

2 Plaintiff(s): **GOLDBERG & DE VILLIERS INC.**

3 Defendant(s): **DANIEL SAKS INC**

CASE INFORMATION -

- 1. *Nature of proceedings* : **DAMAGES (FOR BREACH OF CONTRACT)**