IN THE KWAZULU-NATAL HIGH COURT, PIETERMARITZBURG
REPUBLIC OF SOUTH AFRICA

CASE NO: AR 223/11

In the matter between:

DATCENTRE MOTORS (PTY) LTD **Appellant**
t/a CMH COMMERCIAL

and

REDDY CARGO SERVICES (PTY) LTD
Respondent

JUDGMENT Date: 30 September 2011

PLOOS van AMSTEL J

[1] This appeal arises out of an action in the Pinetown Magistrates' Court in which judgment was granted in favour of the respondent for payment of the sum of R39 045 together with interest and costs. I shall refer to the respondent as the plaintiff and to the appellant as the defendant.

[2] The plaintiff is a road haulier and the defendant a dealer in trucks. It was common cause before the magistrate that during March 2007 the plaintiff purchased five large Nissan truck tractors from the defendant at a price of approximately R800 000 each. The agreement provided for several accessories, including a bull bar which had to be fitted to the front of each of the trucks. When the trucks were delivered to the plaintiff four of them had been fitted with bull bars. According to the plaintiff's manager, Mr Reddy, there had been a delay with the delivery of the trucks, which had become urgent, and the arrangement was that the fifth truck would be fitted with a bull bar in due course.

[3] It was not disputed that shortly after the delivery of the trucks the plaintiff experienced problems with the bull bars. They became loose because of a problem relating to the fixing of the brackets to the chassis of the trucks. The bull bars were replaced but shortly thereafter the same problem was experienced.

[4] The evidence dealt with various communications between the parties thereafter relating to the problem with the bull bars, and between the defendant and the manufacturer of the bull bars. The problem was not resolved and the plaintiff eventually instituted the action in December 2008. The magistrate found for the plaintiff and granted judgment in an amount which represented the purchase price of the bull bars. The quantum of the claim was not in dispute before us.

[5] Two points were raised in the defendant's notice of appeal. The first was that the magistrate erred in failing to find that the plaintiff had accepted the defendant's offer to repair the bull bars and that the plaintiff failed to make its trucks available for the repair work to be carried out. The second point was that the magistrate erred in rejecting the evidence of the defendant's witness, Mr

Constant Oelofse. I deal with them together because they are interrelated.

[6] It was not in dispute that by the time the action was instituted the bull bars had not been repaired. The defendant's case was that after the service of the summons it offered to repair the bull bars, which offer the plaintiff accepted. This is a reference to a letter written by the defendant's attorney on the 1 April 2009. Because this letter forms the foundation of the appeal I quote it in full:

> 'We have taken instructions regarding your claim in this matter.
>
> As your client knows, our client subcontracted the fitment of the bull bars to your client's vehicles.
>
> After your client complained of problems our client subcontracted the work to a certain Mr Constant Oelofse of Smart Trucks to inspect your client's vehicles and to make good any defects or missing bull bars.
>
> It was never possible for our client's subcontractor to carry out this mandate because your client's trucks were never made available and were constantly on the road.
>
> Our instructions are to inform you that our client repeats it's tender to repair and/or replace and/or fit the bull bars which were not properly fitted the first time.
>
> The onus lies with your client to make its vehicles available for this purpose.
>
> The subcontractor appointed by our client to attend to this work is Mr Constant Oelofse who may be contacted on telephone number () or cell phone number . His business is "Smart Trucks" . Alternatively he also has a branch in the Durban area.

The onus is on your client to contact Mr Oelofse and to arrange for a suitable time for each

truck to be brought into his premises for inspection and repair.

This has now been an ongoing state of affairs for an unacceptable length of time.

It is therefore necessary to place your client on terms. Your client will need to produce each of the trucks referred to in its particulars of claim for inspection and if necessary repair by Smart Trucks during the course of April or May 2009. If your client fails to do so then our client will not consider itself to be liable in any manner whatsoever towards your client.

Please note that this letter is addressed to you WITH PREJUDICE.
Having regard to the content of this letter please advise whether you still require us to file a plea.'

[7] The reply to this letter is dated 15 April 2009. The plaintiff's attorney stated as follows:

'Without prejudice to our client's rights, we confirm that we are advised that our client has made contact with your client and that arrangements are being made to replace and/or repair the necessary bull bars on our client's vehicles.

Once this process is complete we will again communicate with you in respect of the finalisation of the matter.

Nothing contained herein and none of the actions taken by our client should be construed in any way as an admission as the correctness of any of the allegations which you have levied against our client and all our client's rights in regard to all issues at all times remain fully reserved.'

[8] By the end of May 2009 the repairs had not been carried out. On 11 June

2009 the defendant's attorney informed the plaintiff's attorney that the deadline had come and gone and that no further work would be done.

[9] The defendant's attorney argued before us that the reason why the repairs were not done was the plaintiff's breach of the agreement concluded in the correspondence to which I have referred, in that it failed to make its trucks available for that purpose. I do not consider that a new contract was concluded in the correspondence. The letter of 1 April 2009 seems to me to amount to a tender by the defendant to repair or replace and fit the bull bars. Certain conditions were attached to the tender, but it seems to me that they did not detract from the tender. In his reply the plaintiff's attorney, without prejudice to the plaintiff's rights and under full reservation thereof, confirmed that the plaintiff had made contact with the defendant and that arrangements were being made to replace or repair the bull bars. This seems to me to have been no more than an agreement by the plaintiff to allow the defendant a further opportunity to repair the bull bars, failing which the action would proceed.

[10] The question however remains as to why no repairs were carried out pursuant to the tender of 1 April 2009. The defendant contended before us that the plaintiff was to blame for this because it never took its trucks to Smart Trucks for inspection and repair of the bull bars. The plaintiff's stance was that Smart Trucks (of which Oelofse was the proprietor) was in possession of the defective bull bars and that until the bull bars had been repaired there was no point in taking the trucks there.

[11] There was a factual dispute before the magistrate as to where the bull bars were when the tender was made on 1 April 2009. Mr Reddy testified that they

were removed in September or October 2007 by Mr Oelofse, who said he needed to take them to his workshop. Mr Oelofse denied this. He said he did not remove the bull bars, nor did he repair them, save for a headlight cover on one of them.

[12] The magistrate had regard to the probabilities and the evidence before him, and accepted Mr Reddy's evidence that Mr Oelofse had taken the bull bars away. This is an important aspect of the matter because if Mr Oelofse was in possession of the bull bars one would have expected him to repair them and then notify the plaintiff that they were ready to be fitted. If, on the other hand, the plaintiff had the bull bars and did not make them available it can hardly complain that they were not repaired.

[13] The correspondence seems to me to support the likelihood that Mr Oelofse had taken the bull bars away.

[14] On 24 October 2007 Ms Bint said in an email to Mr Reddy:

> 'Constant has offered to take the current bull bars on F72, F75, F76 and re-inforce and replace the damaged brackets. Confirmation of this would need to come from yourselves'.

On 21 November 2007 she said:

> 'I'm awaiting a quote from Constant for the repairs & replacements, that were discussed in your meeting with him last week. This should come through shortly. Once we have worked out the pricing, we will send through an order from him to sort your bull bars out'.

On 6 December 2007 she said :

> 'After speaking to Constant this morning, he is just waiting for two more parts to come

> back from chroming. Once he receives the same he will be ready to come and sort out final fitment to your trucks'.

On 7 January 2008 she said:

> 'Further to our telephone conversation earlier today, I would just like to confirm that I spoke to Constant with regards to your bull bars. He is still on leave and will only be back at work on Monday 14 January 2008. He said that he might be going in to work on either Wednesday or Thursday this week as delayed chroming from December is coming through now, of which some is yours'.

[15] On 27 February 2008 Mr Le Roux, from the defendant, stated in an email to Mr Reddy that according to Mr Oelofse 'the other four bull bars' had been repaired. He also referred to brackets that were loose which had been repaired. On 28 March 2008 he again said in an email to Mr Reddy that inspections 'were made and bracket repairs complete…'.

[16] This evidence is not consistent with the evidence of Mr Oelofse that he never had the bull bars and did not repair the brackets. I should also refer to what was put to Mr Reddy by the defendant's attorney at the trial. At page 78 the following was put:' Now our client's version is going to be that Constant repaired those four bull bars…'. At page 138 the attorney said the following to the magistrate:' Round about February 2008 the bull bars were fixed and that was the end of the story.' And further down the page:' ... by February 2008 the bull bars had been refitted to the vehicles and all his complaints had been attended to and since then Mr Oelofse has not had those bull bars.'

[17] It also seems unlikely that a large organisation such as the plaintiff, which had purchased five trucks from the defendant at a price of approximately R 800

000 each, would complain about defective bull bars, the purpose of which is to protect the front of their trucks, then fail to make them available for repairs and a year or so later institute an action for the recovery of a sum of R 40 000.

[18] We can only interfere as a court of appeal if we are satisfied that the magistrate was wrong. He had the benefit of seeing the witness testify and he assessed their credibility in the light of the probabilities in the case. I am not persuaded that he erred in this regard. On the contrary, it seems to me that he got it right.

[19] The case must therefore be decided on the basis that when the tender to perform was made on 1 April 2009 the plaintiff was not in possession of the bull bars. Smart Trucks had removed them on an earlier occasion for the purpose of repairing them. Proper performance by the defendant at that stage would have been to have the bull bars repaired and notify the plaintiff that they were ready to be fitted. The reason why they were not repaired was not any failure on the part of the plaintiff.

[20] It seems likely in my view that the problem lay with Smart Trucks. Ms Bint said she was waiting for a quotation from Oelofse, who never provided one. Oelofse told Reddy at an early stage that the defendant had not accepted his quotation. That was not true. He said in his evidence that he never intended to produce a quotation. The reluctance on Oelofse's side to get on with the repair of the bull bars may be explained by a comment in his evidence that Smart Trucks was not a repair centre, but a manufacturer of exhaust systems and bull bars. It appears from the emails sent by Le Roux that Oelofse had told the defendant that he had done the repairs. After the tender was made on 1 April 2009 Oelofse went

to see Reddy and said there were two parts of the bull bars missing. Reddy said this was why he sent parts of other bull bars to Oelofse, in case he could use some of them. Oelofse sent them back and, according to Reddy, then adopted the stance that he had no obligation to repair the bull bars as Smart Trucks had not made them. Oelofse's explanation to the defendant, whom he presumably did not want to alienate, was that he was not to blame because the plaintiff failed to produce its trucks. In the result, therefore, nothing came of the defendant's tender and the plaintiff proceeded with the action, as it was entitled to do.

[21] In my view the appeal cannot succeed. I propose that it be dismissed with costs.

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I agree: _____