IN THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA

REPORTABLE
CASE NO 98/03

In the matter between

TRANSNET LIMITED **Appellant**

and

SECHABA PHOTOSCAN (PTY) LTD **Respondent**

CORAM: **HOWIE P, ZULMAN, FARLAM, LEWIS JJA et VAN HEERDEN AJA**

Date Heard: 1 March 2004

Delivered: 1 April 2004

Summary: Delictual claim for damages – public tender process – tenderer for purchase contract fraudulently deprived of award when due to win tender – whether loss of profits that it would have earned claimable in delict.

J U D G M E N T

HOWIE P

HOWIE P

[1] The primary question in this appeal is whether on the facts of this case the loss of prospective profits is compensable in law as delictual damages.

[2] Transnet Limited (the appellant), a parastatal corporation, called for public tenders for the purchase of one of its divisions, Transnet Production House, which operated a printing business. Among a number of bidders the respondent company, a well-established printer, submitted a tender, as did Skotaville Press (Pty) Limited.

[3] Despite very strong indications emanating from the appellant during the tender evaluation process that the respondent's tender would succeed, Skotaville was unexpectedly awarded the purchase contract and duly bought the Production House business. Alleging that the award to Skotaville instead of the respondent was the culmination of a fraudulent tender process, the respondent sued the appellant for damages in the High Court at Johannesburg. There were two claims.

[4] At the trial the following was recorded:

'1. For the purposes of settling the merits pertaining to the present trial action (and for no other purposes), the First Defendant concedes the allegations contained in paragraphs 6 to 12 of the Plaintiff's particulars of claim as amended.

2. The First Defendant accordingly admits that the Plaintiff has suffered damages and that the First Defendant is liable in respect thereof.

3. Accordingly, the only issue to be determined between the parties is one of "*quantum*", ie whether the Plaintiff is entitled to the relief set out in its main claim, its alternative claim, or alternative relief plus interest and costs.'

[5] In the light of those concessions and the consequent admission only one claim is relevant now. In terms of that claim compensation was sought in the sum of R60 689 000 being the net profit which it was alleged the respondent would have been able to make in the three years following the purchase had it been awarded the contract. The respondent maintained that the appellant's fraudulent conduct had prevented it from earning that profit.

[6] The learned trial judge (Snyders J) proceeded to hear evidence on the *quantum* of damages. The respondent called three witnesses. They testified to facts, opinions and calculation data, all of which related to three years' net profit which they said the respondent would have earned had it conducted the business of Production House. In the course of cross-examining these witnesses counsel for the appellant foreshadowed certain factual evidence for the appellant but it was not in the end adduced. The tenor of the only evidence which the appellant did lead simply offered some criticism of the method by which the respondent computed its alleged damages. That was a line of defence not pursued with the respondent's witnesses. Having reviewed and considered the respondent's evidence, the learned trial judge

held it to be essentially unchallenged and she accepted it. After making a 5 per cent contingency deduction, she awarded the respondent R57 654 550 as damages. With her leave the appellant appeals.

[7] The main thrust of the argument for the appellant was that the respondent had sought to be placed in the position it would have been in had this been a case for contractual damages, that is, to have its bargain made good. The claim being one in delict, however, the respondent was not entitled to compensation according to that measure but only to such out-of-pocket expenses as it had incurred in preparing and making its bid. The trial court, it was urged, had therefore erred in awarding damages that were not recoverable in law for the wrong that had been done. It must be said that this was not a point taken at the trial or dealt with by the trial court in its judgment.

[8] It is unnecessary for present purposes to refer to the particulars of claim relative to the issue of liability. Although the respondent resisted the appellant's doing so for the first time on appeal, it is clear, in my view, that despite this not having been raised at the trial, it was open to the appellant to advance the contention that the loss of prospective profits was not, as a matter of law, a type of loss which could be taken into account in quantifying a delictual damages claim of the present kind. That question was

not excluded by the settlement agreement on the merits. It was an integral part of the enquiry into *quantum.*

[9] The appellant's main submission rested on three bases: a well known dictum in the case of *Trotman v Edwick*;[1] a passage in the case of *Olitzki Property Holdings v State Tender Board and another;*[2] and authority which, according to the submission, holds that a claimant in delict is entitled to negative *interesse*, not positive *interesse*.

[10] The dictum in *Trotman v Edwick* reads as follows:

'A litigant who sues on contact sues to have his bargain or its equivalent in money or in money and kind. The litigant who sues on delict sues to recover the loss which he has sustained because of the wrongful conduct of another, in other words that the amount by which his patrimony has been diminished by such conduct should be restored to him.'

It does not seem to me that that statement assists the appellant. First, *Trotman's* case was one of fraud inducing a purchase where the land bought was, because of the fraud, not worth the price paid. In our case the fraud prevented the purchase of a business that had, on the evidence, a highly desirable profit-earning potential. Accordingly, there, it was a case of diminution of the value of the plaintiff's assets; trading profits did not come into it. Here, by contrast, it is all about the trading profits that the respondent

[1] 1951 (1) SA 443 (A) at 449B-C.
[2] 2001 (3) SA 1247 (SCA) at 1261.

was due to be able to make but where the opportunity to earn them was deviously denied.

[11] Second, the court approved the perennially true statement that the aim in awarding delictual damages is to put the injured party in the same position as he would have been in but for the delict. [3]

[12] Third, the court in *Trotman* was careful to guard against laying down a formula applicable to all cases of fraud of the nature involved there, that is, fraud inducing a contract. It did not seek to comment at all on fraud having the results involved here.[4] Finally, even in the quoted passage the formulation of the delictual measure of damages is wide enough to include, in a suitable case, loss of profits.

[13] The appellant's reliance on the *Olitzki* decision is also of no assistance to it. That case did involve a loss of profits claim but it was not a case of a tenderer being dishonestly deprived of a contract which it would otherwise have been awarded. There, the plaintiff tenderer was not defrauded. Alleging an irregular, unreasonable and arbitrary tender process, it sought, in the words of this court, 'to evoke a delictual remedy from the interstices of the interim Constitution'[5] on the ground of unlawful administrative action, and to be placed in the same position as it would have been in had it been

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[3] At 450A-C.

awarded the contract. Apart from the fact that the plaintiff could not possibly have shown that it would have been awarded the contract but for the alleged wrongful conduct, the question in that case was not whether loss of profits was claimable in delict but whether there was a delictual claim at all. It was in that context that *Trotman's* case was referred to [6] in order to illustrate that it was inappropriate, by judicial interpretation, to deduce a legislative intention to accord a claim for the benefits of a lost bargain when the clear intention of the constitutional provision under discussion [7] was that the very matter of State procurement of goods and services had to be regulated by subsequently passed legislation. It was accordingly unnecessary for the court to decide whether, if a delictual claim lay, loss of profits was recoverable pursuant to it. One might add that, as a broad generalisation, contractual damages claims by and large do concern recovery of loss of profits whereas delictual claims, by and large, do not. The *Trotman* statement was therefore an effective illustration by means of which to show that the terms of the interim Constitution did not warrant the conclusion that they necessarily

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[4] At 450B-C.
[5] At 1262 para 29.
[6] At 1262 para 28.
[7] Section 187(1) of the Interim Constitution (Constitution of the Republic of South Africa Act 200 of 1993) which read:
'The procurement of goods and services for any level of government shall be regulated by an act of Parliament and provincial laws, which shall make provision for the appointment of independent and impartial tender boards to deal with such procurements.'

afforded the plaintiff a delictual claim. Further than that the *Olitzki* case, in presently relevant respects, did not go.

[14] Turning to the third base of the appellant's argument, the legal position is briefly this. The Roman *id quod interest* (literally, that which is between; broadly, that which makes up the difference) could afford a damages claimant not only out-of-pocket losses but loss of profits as well.[8] In medieval times the word *interesse* came into use but it simply denoted all the damages that had to be paid. Voet[9] defined *interesse* as 'the deprivation of a benefit and the suffering of a loss through such fraud or negligence on the part of an opponent as he is liable to make good and as is assessed in fairness by the duty of the judge' (Gane's translation). It was nineteenth century German scholarship that drew the distinction between positive and negative *interesse.*[10] Specifically with regard to delict, this court has referred to the difference between the patrimonial position of the plaintiff before and after the delict, being the unfavourable difference caused by the delict.[11]

[15] It is now beyond question that damages in delict (and contract) are assessed according to the comparative method.[12] Essentially, that method, in

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[8] Visser and Potgieter *Law of Damages* 2 ed 9-10.
[9] Commentary 45.1.9.
[10] Professor Dale Hutchison, Professor of Private Law, University of Cape Town, in an unpublished paper entitled '*Back to Basics: Reliance Damages for Breach of Contract Revisited'* (delivered in October 2001) 4.
[11] *Santam Versekeringsmaatskappy v Byleveldt* 1973 (2) SA 146 (A) at 150A-C.
[12] Visser and Potgieter *op cit* 2 ed 64.

my view, determines the difference, or, literally, the *interesse.* The award of delictual damages seeks to compensate for the difference between the actual position that obtains as a result of the delict and the hypothetical position that would have obtained had there been no delict.[13] That surely says enough to define the measure. There appears to be no practical value in observing the distinction between positive and negative *interesse* in determining delictual damages.[14] It is a distinction that tends to obscure rather than clarify. If to award the difference means necessarily awarding loss of profits then it does not assist first to ask what positive *interesse* and negative *interesse* comprise.

[16] The idea that loss of profit is not recoverable in delict is not historically founded.[15] Indeed, the converse is the case.[16] Moreover, it is commonly the subject of an award of damages for loss of earning capacity in personal injury cases. Why should it matter that the injury is not physical but economic, as long as the loss is one of earning capacity? Take the example of the owner of a taxi that is negligently damaged. He has a claim for the

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[13] Visser and Potgieter *op cit* 66

[14] For articles providing valuable contributions to the debate concerning positive and negative *interesse* in breach of contract cases see Professor DJ Joubert 'Negatiewe Interesse en Kontrakbreuk' (1076) *THRHR* 1; and Professor G Lubbe 'The Assessment of Loss Upon Cancellation for Breach of Contract' (1984) 101 *SALJ* 616.

[15] Reinhard Zimmerman, *The Law of Obligations: Roman Foundations of the Civilian Tradition* (1990) 972.

[16] Visser and Potgieter *op cit* 75.

profit lost while the vehicle is out of action.[17] Can it make any difference if, subject to quantification, the delict is committed when he has just bought the vehicle, before commencing business? I think not. Nor can it matter if the loss were caused by fraudulent conduct, not negligence. Clearly, the loss would impair his earning capacity and that is part of his patrimony. The claimant in the present case is a company. Once again, that can make no difference. Its patrimony has been impaired by having the bargain that it was on the point of acquiring dishonestly snatched away.

[17] Accordingly, in my view there is nothing in principle or the facts which bars recovery of damages by way of loss of profits in this case. It follows that the appellant's main submission must fail. The respondent is entitled to be placed in the position it would have been in but for its having been fraudulently deprived of the purchase that it was destined to be awarded.

[18] The appellant's next submission was that the trial court had wrongly relied on oral evidence of the contents of certain written service level agreements in determining the profits that the respondent would have made. These were agreements between Production House and various other divisions of Transnet which regulated the quality of work to be done by

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[17] Hutchison *op cit* 6-7.

Production House in terms of supply contracts which Production House had with those divisions and pursuant to which it did their printing work. On the evidence it was these supply and service level agreements which provided the essential attraction for tenderers who sought to buy Production House. They constituted ready-made business with 'captive' clients. According to the appellant's argument it was not possible, on the evidence led, adequately to quantify loss of profits without knowing the contents and the duration of the service level agreements. Consequently admission of oral evidence on those matters infringed the best evidence rule, the hearsay rule and the principle that a plaintiff had to lead all such evidence as would permit the court properly to assess its damages.

[19] These grounds of attack were not raised in the notice of application for leave to appeal. They emerged for the first time in the notice of appeal subsequent to leave having been given. What happened at the trial was this. When the first of the respondent's witnesses, Mr M Visser, who was personally involved in the conclusion of the service level agreements, was asked about their contents in evidence-in-chief there was no objection by counsel for the appellant. (The appellant was represented at the trial by senior and junior counsel. It was represented by different senior and junior counsel on appeal.) Under cross-examination Mr Visser was in fact invited

to state what the contents of the agreements were. He did so unrestrictedly and at length. There was never a suggestion during cross-examination, much less an accusation, that he was uniformed on the subject or that his evidence thus elicited was for any reason to be ignored. In re-examination he said the real value of Production House to the respondent was its relationship with Transnet and its other divisions which relationship was founded on the service level agreements that he had put in place. Once again, there was no objection or challenge from the appellant's counsel.

[20] The second witness, Mr W Petersen, referred only briefly to the agreements in evidence- in-chief. He did not mention their contents.

[21] The last witness for the respondent, Mr A de Aguiar, gave detailed evidence-in-chief about the agreements. He did so without objection by the appellant's counsel. In cross-examination no attack was made upon either the admissibility or the content of that evidence.

[22] In the circumstances just outlined the service level agreements were never in contention either as to the admissibility of oral evidence concerning their contents or as to the contents themselves. The trial court was therefore fully justified in having regard to that evidence and relying on it. It is nothing less than ironic that Transnet raises this complaint when the parties

to the agreements concerned were all part of Transnet. The second submission cannot succeed.

[23] The third and final submission for the appellant was, in effect, that had the admitted fraud not been perpetrated and the purchase contract been awarded to the appellant, it would in any case have had to pay the purchase price (R10 million) and this sum fell to be deducted from the proved damages.

[24] This contention does not appear to have been raised in argument before the court below for it is not mentioned in its judgment. What appears in the evidence is that Mr Petersen was asked in cross-examination whether the deduction should be made and said he did not know how to answer the question. There are also portions of Mr de Aguiar's evidence in which he discussed what he called 'exit value' after expiry of the service level and supply agreements. I shall revert to his evidence presently.

[25] If the Production House business was, on the facts in the respondent's contemplation, not due to have any real value after expiry of those agreements, in other words, if it was bought solely to exploit those agreements until they had become a spent force, it might be a tenable argument that the R10 million purchase price, being the cost of the profit-generating enterprise, should be deducted as itself part of the cost of making

the contemplated profits. It would be otherwise, however, if, in line with a purchase price normally being capital expenditure, the purchased capital asset was expected still to be there after the three years, having retained, or perhaps increased its value. In the latter event the respondent's calculations, as accepted by the trial court, would in my view rightly have excluded any deduction of the purchase price.

[26] Mr de Aguiar, to whom I have already referred, is a chartered accountant with tax and business experience. At the time of trial he was chief executive of a company, Corporate and Merchant Advisers Limited, which he himself had started. He conducted a due diligence test before the respondent's bid was submitted and helped to formulate the bid. He was also involved in the computation of the damages assessment on which the respondent relied in the court below, having taken into account the facts and opinions of the other two witnesses and his own knowledge and expertise. He was pre-eminently the witness to whom the point under discussion should have been put. It was not.

[27] A brief summary of Mr de Aguiar's evidence relative to the role and function of the purchase price and the prospects of an exit value is as follows. The purchase price mainly represented the acquisition of goodwill in the form of the existing agreements with Transnet's other divisions. Only

a small part of the price represented the acquisition of physical assets and it was contemplated that most of them, comprising equipment possessed by Production House, would have been scrapped or just not used by the respondent. Both the purchase price (being input value), and the exit value after three years were capital items, whereas the damages claim focused solely on income and expenditure. The witness said that if the respondent had conducted the business for three years, then, working on a contemplated after-tax profit in the third year of R16 million, and applying the standard valuation used for companies quoted on the Johannesburg Stock Exchange of a price/earnings multiple of 4, the exit value would have been about R64 million. He went on to say that it was not contemplated that new plant would have been bought in the three years. Any surplus work beyond the capacity of the respondent's own equipment and the purchased equipment would have been outsourced. He then said:

'Thereafter, having built up profits and having the capacity to fund and acquire new machinery the business would look to acquire new machinery because the plan was not only to service Transnet but it was going to be one of the customers, the plan was to make this a much larger business and serve its other customers as well. But there was a feeling that in the three year period, because a lot of the service level agreements were only for three years, they would have to focus on Transnet being their major client and

service them to ensure that after the three years they would still be able to retain their clients based on the service and quality that they have given them at the time.'

[28] None of that evidence was challenged or queried. It was certainly never put to Mr de Aguiar that there was a basis for deducting the purchase price from the assessed damages or that there would have been minimal exit value. These are points which should have been investigated by the appellant at the trial. It is too late, when on appeal, to raise uncanvassed factual issues. The evidence demonstrates that there would have been appreciable exit value and that such value, as well as the input value represented by the purchase price, were properly ignored in the computation and award of damages. My conclusion is, therefore, that the third submission must also fail.

[29] No other arguments having been advanced to attack the trial Judge's assessment of damages, the appeal is dismissed, with costs, such costs to include the costs of two counsel in so far as two counsel were employed.

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CT HOWIE
PRESIDENT
SUPREME COURT OF APPEAL

CONCURRED:

Zulman JA
Farlam JA
Lewis JA
Van Heerden AJA