THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

JUDGMENT

Case No: 466/07

In the matter between

MUTUAL CONSTRUCTION COMPANY (TVL) (PTY) LTD **APPELLANT**

and

KOMATI DAM JOINT VENTURE **RESPONDENT**

Neutral citation: *Mutual Construction v Komati Dam* (466/2007) [2008] ZASCA 107 (23 September 2008).

Coram: SCOTT, CAMERON, LEWIS JJA, LEACH AJA and MHLANTLA AJA
Heard: 4 September 2008
Delivered: 23 September 2008

Summary: Contract for the hire of a truck and its operator for use on a building site – operator remaining the employee of the truck's owner but operating on site under the supervision and control of the hirer – operator's negligence on site causing damage to truck– hirer liable to owner for damages.

ORDER

On appeal from: High Court, Johannesburg (Van Oosten J sitting as court of first instance).

(1) The appeal succeeds with costs.
(2) The order of the court a quo is set aside and is replaced with the following:

'(a) The defendant is directed to make payment to the plaintiff of an amount equal to the damages which the parties may agree or which the plaintiff may prove.
(b) The defendant is to pay the costs of the proceedings determining liability.'

JUDGMENT

LEACH AJA (SCOTT, CAMERON, LEWIS JJA and MHLANTLA AJA concurring):

[1] During June 2000 the parties entered into an agreement in terms of which the appellant let to the respondent a CAT 769 articulated dump truck ('the truck'), together with the services of an operator. The respondent, a partnership between a number of major civil engineering companies, was engaged in the construction of the Maguga Dam in Swaziland and used the truck and its operator in the course of its operations at that site. In the early hours of 5 October 2000, the operator fell asleep while driving the truck along a haul road at the site, allowing the truck to leave the road and collide with an embankment. For convenience, I shall refer to this as 'the accident'.

[2] The truck was extensively damaged in the accident and, in due course, the appellant instituted an action for damages in the Johannesburg High Court, claiming payment by the respondent of both the cost of repairing the truck as well as an amount in respect of loss of income because it was out of operation for several weeks until it was repaired. The respondent denied liability and the matter proceeded to trial.

[3] Although the precise terms of the agreement under which the truck had been let to the respondent were an issue on the pleadings, this aspect of the case was initially dealt with as a separate issue under rule 33(4), with Goldblatt J concluding that a written agreement, a copy of which had been attached to the particulars of claim as annexure 'A', contained the terms of the contract between the parties. His finding was accepted by both sides and the terms of the contract can be regarded as finally determined.

[4] The dispute as to the terms of the agreement having been resolved, the matter was set down for trial before Van Oosten J for adjudication of the remaining issues. By the date of the hearing the parties had reached agreement on the cost of repairing the damage to the truck. Although it was agreed that very little evidence would be required to determine the quantum of the claim for loss of income, the learned judge ordered the question of liability to be determined as a separate issue at the outset with the outstanding issues relevant to damages to stand over yet again. After hearing evidence, he concluded that the operator of the truck had negligently fallen asleep as he had failed to rest, despite the respondent offering him the opportunity to do so, a failure which he considered fell beyond the respondent's power of control, and that in these circumstances policy and fairness dictated that the respondent not be held liable for the operator's negligence.

[5] The high court therefore dismissed the appellant's claim. An application for leave to appeal was similarly unsuccessful but, with leave obtained from this court, the appellant now appeals against the dismissal of its claim.

[6] It is a trite principle of our law that the hirer of an article is obliged to return it in the same condition in which it had been at the outset of the period of hire, fair wear and tear excluded. Accordingly, in the absence of agreement to the contrary, all the owner of a hired article has to allege and prove is that it was in a damaged state when returned and it will then be up to the hirer to show that this is due to no negligence on the part of himself or others under his control for whose acts he would be liable.[1] In the present case, the parties are agreed that the damage was due to the operator's negligence in driving when he was so tired that he fell asleep. The hirer's liability is thus entirely dependent on the parties' contract.

[7] The material provisions of the contract are:

'10. Owner 's operator.

> If the plant is supplied with the owner's operator, then while on 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 regarding the nature and the manner of all work to be performed by the operator and the plant on site, the hirer shall be obliged and warrants that he/it will during the hours that the hirer requires the plant to operate provide responsible supervision for the operator while the plant 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 the owner and the operator ….

12. Indemnity.

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[1] See eg *Eensaam Syndicate v Moore* 1920 AD 457 at 458 and *Manley van Niekerk v Assegaai Safari and Film Productions (Pty) Ltd* 1977 (2) SA 416 (A) at 422G-423B.

Anything to the contrary herein contained notwithstanding while the plant is on site, the owner shall not be responsible or liable to the hirer or any other person for any damages of any nature whatsoever (consequential or otherwise) arising out of the plant being faulty or in a defective state of repair or for any acts or omissions 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's operator or for any loss or damage (consequential or otherwise) 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 aforesaid including all costs relating to such claims.

21. Care of plant.

Subject to clause 10 & 12 above the hirer shall be responsible for all expenses arising from the breakdown, loss or damage to the plant occurring through the hirer's negligence, misdirection or misuse, or for any theft of the plant or parts thereof, and shall include the travelling time and costs of the owner and his/its nominee and time lost and expenses incurred through the plant being immobilised or bogged in wet ground, rockfall, subsistence, inundation or the like. The hirer undertakes at all times to exercise adequate security and care in respect of the plant.

22. Self propelled plant.

Where the plant is self propelled and is required to travel under its own power then save as is provided below, the hire period shall be deemed to commence from the time it commences to move on despatch from the owner's depot or site nominated by the owner, whichever is the nearer to the site where it is required by the hirer. In such event, the risk shall be with the hirer for the entire period. When the plant, being self propelled, is required to travel under its own power with an operator supplied by the owner, the risk of loss of or damage to the plant shall pass to the hirer when the plant is delivered or presented for delivery to the hirer's site specified overleaf and shall revert to the owner when the plant commences to move on its return to the owner's depot or site nominated by the owner.'

[8] It will be observed that under clause 21 the respondent (as hirer) became responsible for all expenses arising from the truck breaking down or being

damaged through ‘the hirer's negligence, misdirection or misuse’ until such time as it was restored to the appellant. The issue that arose for determination in this appeal was therefore whether the negligence of the operator who, under clause 10, was to work on site under the respondent's ‘sole and absolute control’, was to be construed as negligence for which the respondent bound itself to be liable under clause 21. This question is to be answered with reference to the contract and not to the principles of vicarious liability in delict, which appears to have been the approach of the high court.

[9] In dealing with this issue, there are certain basic principles which arise. Firstly, any ‘negligence, misdirection or misuse’ envisaged by the agreement had to be conduct on the part of a natural person as a partnership between several juristic persons can only act through natural persons doing so on its behalf. Secondly, a term in a contract is to be read not in isolation but in its context.

[10] Accordingly, in construing clause 21 it is important to bear in mind that although clause 10 provides for the operator to remain in the employ of the appellant, he was at all times to be under the respondent’s ‘sole and absolute control’ while on site and that the respondent undertook to ‘provide responsible supervision’ and to give ‘clear and specific instructions and directions regarding the nature and the manner of all work to be performed by the operator and the (truck) on site’.

[11] Importantly, clause 12 also provides for the appellant not to be ‘. . . responsible or liable to the (respondent) or any other person for damages of any nature whatsoever . . . arising out of . . . acts or omissions on the part of the . . . operator while such operator is carrying out the instructions of the (respondent) or . . . for any loss or damage . . . occasioned to the (respondent) or any other person, property or thing . . . .’ The indemnity given in this clause, which excuses the appellant from liability for damage caused by negligence on the part

of the operator while working under the respondent's instructions on site, amounts to an acceptance by the respondent of liability in those circumstances.

[12] It is clear from this that despite the operator remaining within the employ of the appellant, he at all times acted for and on behalf of the respondent and under its control while working on site. The respondent, in turn, accepted both the risk of damage to the truck as well as liability for the operator's negligence while under its supervision on site. To all intents and purposes, the operator while on site was therefore envisaged in the agreement as being a functionary of the respondent, akin to an employee.

[13] In my view, these considerations all point towards negligence on the part of the operator while on site and under the respondent's supervision and control, being construed as 'the hirer's negligence' as envisaged by clause 21.

[14] This court reached a similar conclusion in *RH Johnson Crane Hire (Pty) Ltd v SA Iron & Steel Industrial Corporation Ltd*.[2] In that matter, the defendant had hired a crane and its operator from the plaintiff under a written agreement which contained clauses identical to clauses 10, 12 and 21 of the present contract. The crane collapsed and was damaged when the operator, acting at the time under the supervision of the defendant's rigger, attempted to lift a heavy load that was beyond its capabilities. The plaintiff sued the defendant for the cost of repairing the crane and for loss of income while the repairs were carried out. Two judgments were delivered, each holding the defendant liable to the plaintiff. In the minority judgment[3] it was held that the crane had been damaged because the defendant's rigger had been negligent, rendering the defendant liable under the provisions of the contract. On the other hand, in the majority judgment[4] it was held that the evidence had been insufficient to determine negligence on the part of the rigger. But as it was common cause that the damage to the crane must

[2] Unreported; case no 207/85 delivered on 31 March 1987.
[3] Viljoen JA, Smalberger J concurring.
[4] Botha JA ,with whom Vivier JA and Kumleben AJA concurred.

have been due to negligence on the part of either the rigger or the operator, the majority reasoned that the failure to prove that the rigger had not been negligent placed the defendant on the horns of a dilemma. On the one hand, its failure in that regard did not allow it to escape liability under the common law which placed a burden on it to prove that there had been no negligence on the part of its servants or those for whose acts it would be liable while, on the other hand, it was unable to escape liability by seeking to contend that the operator had been negligent as '. . . in terms of the conditions of contract the defendant was liable for his acts.' The defendant was therefore found to be liable without the majority having to decide whether the operator had been negligent.

[15] In the light of the above, I conclude that negligence on the part of the operator while driving the truck on site and under the respondent's supervision and control is to be construed as negligence on the part of the respondent as envisaged in clause 21 of the agreement, rendering the respondent liable to the appellant for damages suffered as a result.

[16] Counsel for the respondent sought to avoid the result of that construction by arguing that as the operator had commenced his shift at a time when he was exhausted on returning to site after a long weekend during which he had not properly rested, his negligence which caused him to fall asleep had been at a time when he was off site and not under the respondent's supervision and control.

[17] This argument cannot be upheld. The cardinal point is that the operator was negligent in driving the truck at a time when he was over-tired, which led to his falling asleep and the truck leaving the road. This occurred on site and at a time when he was driving under the respondent's supervision and control. The respondent is accordingly liable under the contract for the damage the appellant suffered as a result.

[18] The appeal must accordingly succeed, with costs. In regard to the order which should be made in substitution of that of the court *a quo*, I intend to use the terms suggested by appellant's counsel in his heads of argument to which the respondent offered no objection.

[19] The following order is made:

(1) The appeal succeeds, with costs.

(2) The order of the court a quo is set aside and is replaced with the following:

> '(a) The defendant is directed to make payment to the plaintiff of an amount equal to the damages which the parties may agree or which the plaintiff may prove.
>
> (b) The defendant is to pay the costs of the proceedings determining liability.'

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L E LEACH
ACTING JUDGE OF APPEAL

Appearances:

For Appellant: R Stockwell SC

Instructed by
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McIntyre & Van Der Post, Bloemfontein.

For Respondent: DA Smith SC
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