

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: I 551/2016

In the matter between:

RIBS LOGISTICS CC

PLAINTIFF

and

SANTAM NAMIBIA LIMITED

DEFENDANT

Neutral citation: *Ribs Logistics CC v Santam Namibia Limited* (I 551/2016) [2017]
NAHCMD 168 (20 June 2017)

Coram: PRINSLOO AJ

Heard: 12 May 2017

Delivered: 20 June 2017

Flynote: Civil Practice –Law of contract and agreements, Insurance Law – Breach of Contract – Law of Damages – General and Specific Damages – Where damages for special damages caused by breach of contract are claimed, it is necessary to allege that the damage was within the contemplation of the parties (or foreseen or foreseeable by them) at the time the contract was entered into and that it

was made on the basis of particular circumstances which render the defendant liable for payment of damages – The court must thus have regard to the insurance contract between the parties. The plaintiff was insured against damage in respect of his truck and trailers. The insurance was thus concerned with the value of the said truck and trailers. The consequential loss of profit or income because of the loss or damage to the vehicle had to be specifically included in the policy.

Summary: The claim of the plaintiff is for specific performance and payment of general and special damages based on breach of an insurance agreement reached between the parties during August 2015 in terms of which the defendant undertook to provide cover to the plaintiff for all loss or damage sustained by the plaintiff of a certain Scania Malcomess (heavy load) motor vehicle as well as two BUSAF trailers respectively under policy number 669/5352 1607 150/7/M.

A claim was submitted by the witness with regards to the damages and losses suffered which claim was denied by the defendant on the basis that the vehicle and trailers were not roadworthy, which statement was denied by the witness. An expert witness testified that there was no evidence visible to suggest that the condition of the vehicle was the root cause of the accident and that the probable cause of the accident could have been that the driver of the vehicle lost control over the vehicle

Before a party to a contract may institute claim for damages for breach of contract the following requirements must be met¹: (a) The other party must have committed breach of contract; (b) The plaintiff must already have suffered actual patrimonial loss in determined or determinable amount as a result of the breach, a causal nexus between the breach of contract and patrimonial loss has to be proven; (c) The party who commits a breach of contract must be liable in law to compensate such loss. This means that the damage must, in terms of principles regarding remoteness of damage (i.e. limitation of liability), fall within the contemplation of the parties.

In this regard, the court is satisfied that the plaintiff discharged the onus vested in it on a balance of probability.

¹Visser&Potgieter. Law of Damages 2nd Edition page 310-311

ORDER

1. The Defendant is ordered to process the plaintiff's claim in respect of the damaged Scania Malcomess(heavy load) motor vehicle (registration number RSX439H) and the two BUSAF trailers (registration numbers BRL809W and BRL 813W respectively) being subject matter of policy number 53521607150 within sixty (60) days from date of judgment;
2. Payment for general damages in respect of storage fees calculated at a rate of Three hundred Namibian Dollars (N\$ 300.00) per unit per day from 03 December 2015 to date of payment.
3. Interest at a rate of 20 % per annum *a temporamora*.
4. Cost of suit.
5. Further and/or alternative relief.

JUDGMENT

Prinsloo AJ

Introduction:

[1] The Plaintiff is Ribs Logistics CC, duly incorporated in terms of the Close Corporation Act of 1988 with registration number CC/2015/06386 and its registered office at 2400/22, Auto Tech Flats, Tsumeb, Republic of Namibia.

[2] The defendant is Santam Namibia LTD, a private company duly incorporated in terms of the Companies Act of 2004.

[3] The matter was set down for trial on 08 May 2017.

Background:

[4] This matter was set down for hearing on 08 May 2017. On 05 May 2017, the defendant filed an application to condone the defendant's failure to file its expert witness statement and applied for postponement of the trial.

[5] After considering the interlocutory application, the court dismissed the condonation application and application for postponement. As the counsel who acted on behalf of the defendant had no further instruction to proceed with the trial and excused himself from the proceedings, the court hereafter regarded the defendant to be in default and proceeded in terms of Rule 98(1), in the absence of the said defendant.

[6] Rule 98(1) provides:

'If a trial is called and the plaintiff appears and the defendant does not appear in person or by his or her legal practitioner, the plaintiff may prove his or her claim insofar as the burden of proof lies on him or her and judgment must be given accordingly insofar as he or she has discharged such burden, but, if the claim is for a debt or liquidated demand no evidence is necessary unless the presiding judge otherwise orders.'

[7] The claim of the plaintiff is for specific performance and payment of general and special damages based on breach of an insurance agreement reached between the parties during August 2015 in terms of which the defendant undertook to provide cover to the plaintiff for all loss or damage sustained by the plaintiff in respect of a certain Scania Malcomess (heavy load) motor vehicle as well as two BUSAF trailers respectively under policy number 669/5352 1607 150/7/M.

[8] In the particulars of claim. the relief sought by the plaintiff was set out as follows:

1. That the Defendant be ordered to process Plaintiff's claim in respect of damaged Scania Malcomess (heavy load) motor vehicle and the two BUSAF trailers;
2. Payment of general damages to be quantified as from the date of issue of summons to the date of judgment;
3. Payment of special damages to be quantified from the date of issuing summons to the date of judgment.
4. Cost of suit;
5. Further and/or alternative relief.

[9] As is evident from the prayer, the claim is not for debt or liquidated demand. It was thus necessary for the court to receive evidence from the plaintiff and other witnesses in order for the plaintiff to discharge the burden of proof as far as such is rested on it, before the plaintiff could move for judgment.

Plaintiff's case:

[10] The plaintiff called three(3) witnesses to testify on its behalf.

Mr. David Mapendere:

[11] Mr. Mapendere testified as an expert witness. He testified on the probable cause of the accident as well as the road worthiness of the plaintiff's vehicle.

[12] The witness relied on the summary of his expert report² that was filed in terms of Rule 29. He also referred the court to the vehicle assessment report³ which he compiled.

[13] He recorded the vehicles as VIN no. YS2RH6X4Z01175729; AC912146 RS6AZ1419 and AC912147FS6A1420.

²Page 67-69 of the Pleadings Bundle.

³ Page 172 of the Discovery Bundle.

[14] He stated that on 10 June 2016 he inspected the vehicles of the plaintiff in a yard in Zeerust, South Africa and his conclusion was that there was no evidence visible to suggest that the condition of the vehicle was the root cause of the accident and that the probable cause of the accident could have been that the driver of the vehicle lost control over the vehicle⁴.

Mr. Kudzanai Takorera

[15] Mr. Takorera stated that he was the driver of the vehicle of the plaintiff, namely a Scania Malcomess (heavy load) and two BUSAF trailers, registration numbers RSX439H; BRL 809W and BRL813W.

[16] The witness confirmed that he is a licensed driver and was in the employ of the plaintiff at the time of the incident, 26th November 2015.

[17] The vehicle was fully loaded at the time with maize meal and the witness stated that, as he was approaching the Skilpadhek Borderpost whilst on route from Johannesburg, he noticed that another truck was parked on the roadway at the police check point. He stated it was on a decline and when he tried braking he realized that he will not be able to do so in time and swerved into the lane of the oncoming traffic. There was however another truck approaching. He avoided the truck but as there was a curve in the road he lost control over the vehicle when he attempted to negotiate the curve and the truck overturned.

Mr. Mbabvu Trust:

[18] Mr. Trust testified that he was the sole member of the plaintiff and that he concluded the insurance agreement in his representative capacity on behalf of the plaintiff with the defendant.

[19] The witness stated that on 26th November 2015 the vehicles belonging to the plaintiff overturned at border between South Africa and Botswana. These vehicles,

⁴Paragraph 11 of Witness statement of the witness on page 69 of the Pleadings Bundle.

being a Scania Malcomess (heavy load) motor vehicle registration number RSX 439H was well as two BUSAF trailers registration number BRL 809 W and BRL 813W was driven by Mr. Takorera at the time of the accident.

[20] Mr. Trust stated that, as a direct result of the accident, the plaintiff suffered damages to the motor vehicle and trailers and incurred costs for the towing of the damaged vehicle and the storage cost accruing on a daily basis at a rate of N\$ 300 per day per unit.

[21] The witness further alleged that the plaintiff suffered loss of profit due to the unjustified refusal by the defendant to pay out the claim as per the insurance agreement.

[22] In support of his claim, the plaintiff handed in the insurance agreement with the defendant reached during August 2015 wherein the defendant undertook to provide cover to the plaintiff for loss or damages sustained by the closed corporation in respect of the motor vehicle and trailers belonging to the plaintiff. In respect of the comprehensive cover the Scania truck was insured for N\$ 150 000 and the two BUSAF trailers for N\$ 60 000 each⁵. The insurance agreement also covered a standard extension in respect of wreckage removal in the amount of N\$ 25 000 each in respect of truck and two trailers⁶.

[23] A claim was submitted by the witness with regards to the damages and losses suffered which claim was denied by the defendant on the basis that the vehicle and trailers were not roadworthy, which statement was denied by the witness. Witness also handed in roadworthy certificates of the vehicle and trailers In question in order to show the contrary. The witness also handed in invoices relating to the refurbishing of the brakes and the replacement of the brakes lines, as one of the reasons for declining the claim of the plaintiff was that vehicles were not roadworthy due to defective brakes.

⁵Discovery Bundle page 152.

⁶Discovery Bundle page 153 and 154.

[24] Mr. Trust testified that he paid his premiums towards the defendant as agreed between the parties and that the defendant is in breach of their agreement by declining plaintiff's claim.

Discussion of relevant legal principles:

[25] Before a party to a contract may institute claim for damages for breach of contract the following requirements must be met⁷:

- a) The other party must have committed breach of contract;
- b) The plaintiff must already have suffered actual patrimonial loss in determined or determinable amount as a result of the breach, a causal nexus between the breach of contract and patrimonial loss has to be proven;
- c) The party who commits a breach of contract must be liable in law to compensate such loss. This means that the damage must, in terms of principles regarding remoteness of damage (i.e. limitation of liability), fall within the contemplation of the parties.

[26] In this regard, the court is satisfied that the plaintiff discharged the onus vested in it on a balance of probability.

[27] The plaintiff seeks specific performance in terms of which the defendant must be ordered to comply with its contractual obligations by accepting and processing the plaintiff's claim in respect of the damaged truck and trailers.

Specific performance as remedy for breach:

[28] Christie's *Law of Contract in South Africa* 7 ed⁸ at 616 states:

'The remedies available for a breach or, in some cases, a threatened breach of contract are five in number. Specific performance, interdict, declaration of rights, cancellation, damages. The first three may be regarded as methods of enforcement and the

⁷Visser&Potgieter. *Law of Damages* 2nd Edition page 310-311.

⁸ G B Bradfield *Christie's Law of Contract in South Africa* 7 ed (2016) at 616.

last two as recompenses for non-performance. The choice among these remedies rests primarily with the injured party, the plaintiff, who may choose more than one of them, either in the alternative or together, subject to the overriding principles that the plaintiff must not claim inconsistent remedies and must not be overcompensated.'

[29] The plaintiff is entitled to the relief that it seeks. It has established that Mr. Trust concluded a valid agreement on its behalf with the defendant; that defendant repudiated the agreement; that plaintiff complied with his obligation under the agreement by making regular payments toward the insurance policy; and that plaintiff had elected to hold defendant to the terms of the agreement.

[30] The plaintiff also seeks damages consisting of general damages as well as special damages resulting from the breach of contract by the defendant. Said claims for damages needed to be quantified.

Damages:

[31] In terms of *general damages*, the plaintiff prays for the following:

31.1. Payment of storage fees at a rate of N\$ 300.00 per day per unit. The vehicles has been in storage in Zeerust, Republic of South Africa since 03 December 2015. Mr. Trust testified handed the quotation of the said storage fees in as an exhibit⁹. To date none of the storage fees has been paid and the wreck of the truck and trailer is still at the specific storage yard.

31.2. Payment of towing fee at a rate of N\$ 54 478.32. Mr. Trust handed in a quote from Zeerust Towing, being the same company where the wrecks of the truck and trailer is currently stored¹⁰.

31.3. Expenses relating to witnesses in the amount of N\$ 14 921.00. Mr. Trust presented the court with invoices expended in respect of the expert witness and also the traveling and accommodation of the three witnesses¹¹.

⁹Exhibit I.

¹⁰Exhibit H.

¹¹Exhibit K1-6.

[32] The learned authors Visser and Potgieter in Law of Damages discuss general damages as follows¹²:

'General damages (also referred as intrinsic damages) often refers to damage which is legally presumed to flow from an unlawful act or breach of contract which need to be generally pleaded only. The contractual context of general damage is that the loss that flows naturally from the breach of contract and which presumes to have been within contemplation of the parties as a realistic possibility of occurrence. In such a case the plaintiff has to prove merely the extent of his damage and not that it was foreseeable, as the law presumes such foreseeability.'

[33] Storage fees and towing fees are expenses that are a realistic possibility of occurrence in the case of an accident and the plaintiff would be entitled to such general damages. However, the insurance policy make specific provision for wreck removal at a rate of N\$ 25 000 per unit¹³. Should the court grant the towing fee as part of the general damages, it would amount to duplication of damages. It is contrary to the object of damages to compensate the same damage (or part thereof) twice¹⁴.

[34] The claim in respect of the expert witness and the traveling costs and accommodation cannot resort under general damages. In *Taylor v Mackay Bros & McMahon Ltd*¹⁵ the court held that the object of allowing a successful party to recover his costs, including fees of his witness, is that he may be indemnified in some measure. It is this court's understanding that the allowances paid to witnesses and which are prescribed pursuant to section 38 of the High Court Act No. 16 of 1990 may be claimed on taxation in respect of any witness, lay or expert.

[35] In terms of *special damages* the plaintiff claims for loss of profit in the sum of N\$ 35 000 per month calculated from date of summons.

¹²At Page 278.

¹³Discovery bundle page 153 and 154.

¹⁴Law of Damages Supra at page 173.

¹⁵ 1947 4 SA 423 (N) at 429; Also Cilliers on Law of Costs at par 13.28 page 13-32.

[32] According to Visser and Potgieter in *Law of Damages*, special damages must be specially pleaded and full particulars thereof must be supplied. Then proceed to discuss it as follows¹⁶:

‘Where damages for special damages caused by breach of contract are claimed, it is necessary to allege that the damage was within the contemplation of the parties (or foreseen or foreseeable by them) at the time the contract was entered into and that it was made on the basis of particular circumstances which render the defendant liable for payment of damages. A claim for damages other than the normal or legal measures constitutes special claim for damages and it must be alleged and proved that it was within the contemplation of the parties’.

[36] The plaintiff indeed pleaded the special damages, however it is not automatic relief that will be granted by court. The normal standard of proof on a balance of probabilities applies in regards to proof of damages and damages applies¹⁷.

[37] The court must thus have regard to the insurance contract between the parties. The plaintiff was insured against damage in respect of his truck and trailers. The insurance was thus concerned with the value of the said truck and trailers. The consequential loss of profit or income because of the loss or damage to the vehicle had to be specifically included in the policy. The liability of the insurer is limited to ‘direct’ loss, but this term actually means nothing more than the loss and risk agreed upon¹⁸.

[38] Loss of profit or income is not flowing naturally and directly from breach of contract, but from conclusion of the contract¹⁹.

[39] A policy may contain diverse principles, which will influence the amount payable by the insurer as well as different forms of indemnity insurance where recovery of compensation can be limited or extended to further forms of damage for

¹⁶Law of Contract page 483.

¹⁷ Law of Damages page 488.

¹⁸Law of Damages page 358.

¹⁹Svorinic and Others v Biggs 1985 (2) SA 573 (W).

that matter. There appear to be no such extended form of coverage *in casu*. Plaintiff can therefore not succeed in his claim for special damages.

[40] As a result I make the following order:

1. The Defendant is ordered to process the plaintiff's claim in respect of the damaged Scania Malcomess(heavy load) motor vehicle (registration number RSX439H) and the two BUSAF trailers (registration numbers BRL809W and BRL 813W respectively) being subject matter of policy number 53521607150 within sixty (60) days from date of judgment;
2. Payment for general damages in respect of storage fees calculated at a rate of Three hundred Namibian Dollars (N\$ 300.00) per unit per day from 03 December 2015 to date of payment.
3. Interest at a rate of 20 % per annum *a tempora morae*.
4. Cost of suit.
5. Further and/or alternative relief.

JS Prinsloo
Acting Judge

APPEARANCES:

For the Plaintiff:

F. Bangamwabo

Of:

Clement Daniels