THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Case No. 309/97

In the matter between:

A A ALLOY FOUNDRY (PTY) LIMITED Appellant

and

TITACO PROJECTS (PTY) LIMITED Respondent

Court: GROSSKOPF, HARMS, ZULMAN JJA, and MELUNSKY and MPATI AJJA
Heard: 2 NOVEMBER 1999
Delivered: 12 NOVEMBER 1999

Damages due to breach of contract - loss of management time - collateral benefits. Attorney and client costs.

JUDGMENT

HARMS JA/

HARMS JA:

[1] The plaintiff (the present respondent) was employed during 1989 by Purity Ferrochrome (Pty) Ltd (hereinafter referred to as "Purity") to design, supply, erect and commission a smelter for smelting chromate ore at Purity's ferrochrome plant in Rustenburg. This included the provision of two furnaces. A Japanese concern,

Tanabe, as subcontractor, supplied the necessary technology and commissioning and engineering services. Each furnace has three electrode columns, the extremities of which penetrate the ore mix and generate the heat necessary for smelting. Electric current is transferred through contact shoes to the upper part of the electrodes, each being serviced by eight shoes in such a way that the shoes are not directly in contact with the ore mix. Contact shoes have more the appearance of shoe soles than of shoes, are concave on the inner surface in order to fit snugly around the electrodes and have cavities for circulating cooling water.

[2] They are conventionally made of either brass or copper, each shoe weighs several hundred kilograms and is about 1,25m in length and 0,5m wide. A casting process is used to manufacture them and the defendant (the appellant), who operates a foundry, was subcontracted by the plaintiff to produce 48 shoes made of brass. In due course the defendant provided the shoes ordered; they were installed and soon gave problems. The plaintiff, Purity and the project manager had great difficulty in establishing the cause of the problems and eventually came to the conclusion that it was because the defendant had used a brass alloy which did not conform to the British Standards Specification (BS 2870/1980 CZ103). In the event, the plaintiff rejected the shoes, tendered redelivery and claimed damages. An alternative claim based upon an alleged repudiated settlement and which was the subject of separate adjudication was

dismissed.[1] The damages claim succeeded before Heher J and this appeal is with his leave.

[3] Brass is an alloy of copper and zinc and, depending on its intended application, the ratio between them may vary. Impurities are always present and the nature and quality of the brass depend upon the identity of any particular impurity and the amount present. The said specification prescribes an 80:20 copper-zinc alloy with a maximum lead content of 0,05% by mass. It became common cause that the brass used by the defendant contained lead far in excess of the prescribed maximum. Generally speaking, lead deleteriously affects the quality of brass and the higher the lead content the greater the loss of ductility and this, depending upon the operating conditions, may manifest itself in cracking. The scientific explanation is fairly simple. Lead does not dissolve in brass like sugar does in water but remains undissolved, much like sand. Due to its low melting point of 327° C, it will start melting long before the alloy which melts at about 1000° C. Once the lead melts it weakens the brass.

[4] The first issue to decide is whether the defendant was contractually obliged to supply brass shoes with less than 0,05% of lead by weight in accordance with the said British Standard. The

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[1] Its final outcome is reported: *Titaco Projects (Pty) Ltd v A A Alloy Foundry (Pty) Ltd* 1996 (3) SA 320 (W).

answer to the question depends upon the interpretation of clause 1 of the written contract (the "purchase order") between the parties. Clause 1 provides that:

> "This purchase order ... constitutes the sole and entire agreement between the parties hereto. The Contractor's quotation is incorporated in and made a part of this purchase order only to the extent of specifying the nature and description of the goods ordered. ... No other terms or conditions shall be binding upon Purchaser unless accepted in writing."

The focus is on the identification of the defendant's "quotation": the plaintiff's case is that the quality control plan prepared by the defendant which specified that the material to be used for the contact shoes would conform to the British Standard was part of the quotation and was incorporated into the purchase order because it specified the nature and description of the goods ordered. Although admitting the existence of the plan the defendant denies that it formed part of its "quotation".

[5] Heher J held that if it were established that the defendant had submitted the plan as part of its quotation, compliance with the plan would have been a contractual obligation. He found that a document entitled "Quotation", together with the plan, was submitted to the plaintiff by the defendant in one envelope, and that before the conclusion of the contract these two documents were discussed and

considered together by both parties. These findings, which are relevant in identifying the "Contractor's quotation" referred to in clause 1 of the purchase order, were rightly not attacked on appeal. Corroboration for this finding is to be found in the fact that there was a reason why the defendant would have provided a quality plan as part and parcel of its quotation. According to the tender documents provided to the defendant and on which the tender had to be based, the defendant was obliged to "submit with his tender details of his quality plans". In particular, the defendant was called upon to submit "full details of the brass selected" for the contact shoes and the said British Standard was suggested. The document headed "Quotation" itself did make reference to the nature of the brass by stating that the copper-zinc ratio would be 80:20 - which was in any event the prescribed according to the drawings prepared by Tanabe and provided to the defendant - but it did not provide the required full details of the brass selected. That was set out in the accompanying plan. These facts satisfy me that Heher J was correct in concluding that the quotation referred to in the purchase order was intended by the parties to include the quality plan. Evidence of such an identifying nature is

permissible and does not infringe the parol evidence rule (*Van Wyk v Rottcher's Saw Mills (Pty) Ltd* 1948 (1) SA 983 (A) esp at 990-992).

[6] Having used brass which does not conform to the prescribed specification, the question that arises is whether the defendant was in breach of clause 12 of the purchase order which reads:

> "Contractor warrants that the goods shall be free from defects in ... material ... and shall conform in all respects to the terms of the purchase order. ... If it appears within one year from the date of placing the equipment into service for the purpose for which it was purchased, that the equipment or any part thereof, does not conform to these warranties, and Purchaser so notifies Contractor within a reasonable time after its discovery, Contractor shall thereupon promptly correct such nonconformity at its own expense. ... Except as otherwise provided in this purchase order, Contractor's liability shall extend to all damages proximately caused by breach of any of the aforegoing warranties or guarantees, but liability shall in no event include loss of profit or loss of use ..."

To the extent relevant to this case, the clause contains two separate and distinct warranties: the goods were to be free from defects and, second, the goods had to conform in all respects to the terms of the purchase order. In the light of the foregoing, it follows that the brass supplied was not in conformity with the terms of the order. Because the general principle is that contracts must be *in forma specifica* rather

than by way of equivalents (*cf Maennel v Garage Continental Ltd* 1910 AD 137 at 148; *Algoa Milling Co Ltd v Arkell and Douglas* 1918 AD 145 at 158; *Tulbagh Municipality v Waveren Building Contractors (Pty) Ltd and Others* 1966 (4) SA 618 (A)), the defendant's failure amounted to a breach of contract.

[7] Since the defendant refused to rectify the breach in terms of the quoted clause, the extent of its liability has to be determined. The plaintiff rejected the shoes and offered to return them to the defendant. As a result, the plaintiff had to replace them and supply Purity with another set in terms of its main obligation under the construction contract which was to supply contact shoes for the smelter in accordance with its design. It then again matters not whether the shoes failed because of excessive quantities of lead.

[8] Purity, in the meantime, had sold its smelting business, comprising all its assets as a going concern to Consolidated Metallurgical Industries Ltd ("CMI") and at the time when the shoes were rejected, Purity had no further interest in their replacement. The plaintiff negotiated the replacement of the 48 shoes with the new owner of the smelter. It settled by undertaking to provide CMI with 16 copper shoes which costs R183 325 together with a payment of R200 634, an alternative which was much cheaper than supplying CMI with 48 new brass shoes of acceptable quality. The case was argued on the assumption that liability of the defendant for the payment of these sums depended on whether Purity's rights to performance in terms of the construction contract had devolved upon CMI, the supposition being that in the absence of a contractual obligation towards CMI, the plaintiff could not have suffered any

damages. I shall assume that this approach is correct. Although CMI purchased all Purity's assets - and its rights against the plaintiff would obviously fall within that category - the fact of the matter is that the sale agreement, whilst providing a list of ceded contracts, omitted a reference to the construction contract. Nevertheless it did provide for a cession of the plaintiff's performance guarantees. At the time it was not suspected that the defendant had failed to supply shoes conforming to the British Standard; to the contrary, the defendant, innocently it seems, had transmitted to the plaintiff analysis certificates which certified due compliance.

[9] Finding in favour of the plaintiff, Heher J relied heavily upon a warranty clause in the CMI contract. I have some hesitation in accepting the correctness of his interpretation and prefer to base my judgment on another ground. Since Purity had sold all the assets of the going concern to CMI, any contingent rights against the plaintiff - in this case a claim for the supply or resupply of the shoes - were part of the object sold. As a witness attempted to point out, it hardly made sense for CMI to have taken cession of the performance guarantees if the right to enforce the primary performance did not also vest in CMI. The same witness, Smidt, who was recalled after the point had arisen for the first time during argument, testified that as far as he could recollect, the plaintiff had signed a cession (he probably meant a consent to a cession) to CMI with respect to discharging all of its obligations in terms of its relationship with Purity. Although he did not produce the document, his evidence was not challenged and accords with the probabilities having regard to the conduct of the parties involved after the sale. Even the defendant took part in the negotiations with CMI on the replacement of the contact shoes.

[10] Two heads of damages were debated before us. The first concerns the damages suffered as a result of the plaintiff having settled with CMI, a matter alluded to in par [8] above. In summary, the plaintiff settled with CMI, undertaking to provide 16 copper shoes, making a cash payment and providing a performance guarantee in respect of the new shoes. Complying with its obligations, the plaintiff applied for a guarantee and contracted with another foundry to cast the copper shoes. Since it had some financial and cash flow problems, the plaintiff's holding company ("TCI" for short) made all these payments before summons was issued. In the absence of a "formal" agreement and book entries to reflect a debt between the plaintiff and TCI and since TCI had written off the debt for tax purposes, the defendant argued that the plaintiff had failed to prove that it had a legal obligation to repay TCI and that without such an obligation the plaintiff cannot be said to have suffered damages. The

trial judge accepted the notion that a legal obligation to repay TCI had to be shown but concluded that there was a tacit agreement to repay TCI whenever the plaintiff was able to do so.

[11] The plaintiff and TCI, the evidence disclosed, in conducting their business, tended to disregard their respective corporate identities. Employees of the one worked for and acted on the behalf of the other whenever it suited their business. It was not even always clear in whose employ a particular individual was. In negotiating with CMI, the legendary corporate veil was discarded. Whether TCI paid as agent, *negotiorum gestor* or as donor, it paid the plaintiff's debt. The plaintiff suffered its loss when the breach occurred and was entitled to be recompensed by the defendant, and the fact that TCI had paid is at best a collateral benefit. (*Hunter v Shapiro* 1955 (3) SA 28 (D); *Sandown Park (Pty) Ltd v Hunter Your Wine & Spirit Merchant (Pty) Ltd and another* 1985 (1) SA 248 (W)). The defendant's counsel, correctly in my view, did not attempt to support the trial court's reasoning to the contrary.

[12] Loss of management time in the other head of damages in contention. Forbes J in *Tate & Lyle Food and Distribution Ltd v Greater London Council and another* [1981] 3 All ER 716 (QBD) accepted the proposition that the loss of managerial time which otherwise might have been engaged in the trading activities of a concern and which had to be deployed in managing the consequences of a wrongful act (in that case a tort) can be claimed as a head of damages, provided the loss can be quantified. As a general proposition this must be correct. But there must be at least some

evidence that the managers would have expended their time on one or other income generating venture, and that managing the consequences of the wrong was not simply dealt within the ordinary course of their duties.

[13] Witnesses for the plaintiff analysed the time spent in investigating the reasons for the failure of the shoes, the best means of correcting the problem and in making good the defendant's default. Because the plaintiff is in the business of selling the time and services of its employees, it was able to prove the cost to it for every hour spent by each individual employee. The trial court, in its calculation, deducted the profit element because the warranty clause quoted in par [6] above, excluded claims for loss of profit.

[14] Due recognition must be given to the fact that it is extremely difficult to prove damages such as these and that in assessing the sufficiency of the evidence "a fairly robust approach" may be adopted (*Thompson v Scholtz* 1999 (1) SA 232 (SCA) 249B).

[15] During his evidence in chief, the plaintiff's witness, Wilson, testified that there was a loss for the plaintiff because "if there was no problem with the contact shoes we would not have to do that and that is time lost to us." He conceded during cross-examination that the cost to the company of, say, his salary did not change because

that cost was a constant. This evidence did not address the issue. However, Smidt, the chief executive officer of the plaintiff gave the following evidence:

> "There is one suggestion which was made, and I would like you to deal with it, to Mr Wilson, namely that if one has regard to EXHIBIT M it was suggested that these employees of the plaintiff, including yourself and Mr Wilson, were paid their salaries by the plaintiff in any event, whether they were busy dealing with contact shoes problems or any other problems and therefore plaintiff cannot suggest that time spent on the contact shoe problem constitutes a loss to the plaintiff. — I think that presupposes that our people would otherwise have stood doing nothing and would not be recovered in other areas. I think if you accept that, generally speaking, a large proportion of our income is derived from recovery and sale of man hours it does not really hold true. I think had they not been working in this area they would have been working elsewhere in a recoverable manner."

Smidt was not cross-examined on the issue and the matter was left somewhat in the air. Since there is nothing to gainsay the slightly tentative evidence and taking less than a robust view of the matter, I believe that the evidence suffices to establish as a probability that the time spent would otherwise have been utilized gainfully, especially in view of the nature of the plaintiff's business.

[16] Turning ultimately to the question of costs, Heher J ordered the defendant to pay costs on the scale as between attorney

and own client. Because I am of the view that the judge misdirected himself on a number of aspects relating to costs, it becomes necessary to deal in some detail with his findings relative to the issue.

[17] The defendant's witness, Smith, gave false evidence relating to the question whether the quality control plan accompanied the quotation. However, to hold that this issue was the "real dispute" in the case and that but for it the case would have been substantially shortened in my view overstates the position. Counsel's submission that the dispute did not contribute more than 10% to the case is closer to the mark. Dishonesty on one of a large number of issues does not usually justify a special order as to costs in relation to the whole of the case, including the expensive technical evidence which was triggered by the allegations made by the plaintiff in its particulars of claim, superfluously as it transpired in the end. For example, of the six warranties relied upon, the plaintiff eventually abandoned five, and of the eight breaches it succeeded on one.

[18] Another pebble in the judicial shoe was the defendant's "ill-judged attempt to obstruct the course of justice." Seven instances were enumerated where the defendant had refused to make requested

admissions; some of the refusals were found to have been without a *bona fide* basis, unnecessary, without substance, vexatious or opportunistic. Except in one instance, the disputed items became common cause or did not take up more than a page or two of evidence. The exception relates to an admission on quantum or aspects of quantum. Although the behaviour of the defendant was irritating and somewhat obstructive, it succeeded to reduce the quantum from about R480 000 to R400 000. The fact is, the plaintiff would probably have been absolved from the instance if it was not permitted to reopen its case to present evidence on damages during argument. Once again, in the context of the case as a whole, the defendant's recalcitrant behaviour on this aspect did not substantially increase the costs. It is noteworthy that the trial judge, in dealing with the refusal to admit quantum did not brand the defendant's behaviour with any deprecatory epithet or adjective.

[19] The final complaint about the defendant's conduct relates to the fact that despite requests from the plaintiff, the defendant's expert failed to attend a pre-trial conference with the plaintiff's new expert. A meeting had been held with the plaintiff's former expert,

but it produced nothing of consequence. Having read and reread the expert evidence, I am unable to envisage how the litigation would have been curtailed by a meeting. The scientific battle lines were clearly drawn and each stuck to his own gun. In any event, it was within the province of the trial judge to have ordered a conference during the trial, something that was not done.

[20] To sum up, in considering a punitive costs order a court should warn itself against using hindsight in assessing the conduct of a party. The defendant had an eminent expert who gave an opinion based upon experimental data which was not controverted and was entitled to rely thereon. Its defences were substantial although in retrospect misconceived. Even the trial judge by granting leave to appeal thought that there was a reasonable prospect of success on appeal. The learned judge did refer to authorities that hold that dishonesty in the proceedings and presenting false evidence are grounds for awarding costs on the attorney and client scale but the quantum leap to the "own" portion was not explained. Although invited to deal with the difference between the two types of attorney and client costs, but not having had the advantage of full argument, I

wish to say as little as possible. It has become notable that a practice has taken roots in some jurisdictions of making awards of costs on an attorney and own client scale where someone other than the own client or his privy is involved. Whether such orders are justified or justifiable in the light of decisions of this Court (such as *Nel v Waterberg Landbouwers Ko-operatiewe Vereeniging* 1946 AD 597) may to be questioned. Further, sight appears to be lost of the fact that they may have unexpected or unforeseeable consequences (*Cambridge Plan AG v Cambridge Diet (Pty) Ltd and Others* 1990 (2) SA 574 (T)).

[21] Having identified a number of material misdirections, this Court is entitled to exercise its own discretion. Because there is nothing special about the defendant's conduct, excepting Smith's dishonesty, which deserves the severe opprobrium of a special costs order in this case, costs ought to be on a party and party scale. It is not feasible to isolate the costs caused by the dishonesty in order to make a special award in that regard. The defendant's limited success on appeal cannot carry the costs of appeal. The employment of two counsel by the plaintiff for purpose of the appeal, on the other hand,

was fully justified having regard to the nature and scope of the appeal.

The following order is made:

(a) The appeal is upheld to the extent only that par 4 of the order of the court *a quo* is amended to read: "Costs of suit as between party and party."

(b) The appeal is otherwise dismissed with costs, including the costs of two counsel.

L T C HARMS
JUDGE OF APPEAL

Agree:
GROSSKOPF JA
ZULMAN JA
MELUNSKY AJA
MPATI AJA