REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 15476/13

(1) REPORTABLE: YES
(2) OF INTEREST TO OTHER JUDGES: YES
(3) REVISED. NO

13 March 2015

In the matter between:

SARENS SOUTH AFRICA (PTY) LTD — Plaintiff

and

CLEVELAND CRANE HIRE CC — Defendant

JUDGMENT

CORAM: RE MONAMA, J

[1] The plaintiff is the South African company with international footprint. Its international head office is in Europe. The plaintiff is the major

participant in the heavy lift, projects and mobile crane hire business in the world. It is one of the largest and versatile lifting company. It operated planning, and crane rigging services. Its South African component is situated in Alrode, Gauteng Province.

[2] The defendant is a lifting equipment company. It specialises in the crane industry. It is based in Johannesburg. The defendant is the sole member former employee of the plaintiff.

[3] The parties are members of the Contractors Plant Hire Association ("the CPHA"). The parties have adopted verbatim the CPHA generic terms and conditions for their business.

[4] On or during 21 November 2012, Thulani Brian Hobgan ("Hobgan"), the executive of the defendant received a request from Southern Power Management ("SPM") for a crane with a capacity of fifty ton and able to cover a radius of 12 meters. The crane was to be used to lift the faulty electrical transformer and to install the replacement. He did not have the requisite crane in his fleet. He approached Lyle Justine Tapinos ("Tapinos"), the executive of the plaintiff for assistance The latter was provided with the necessary specifications of the plaintiff. A quotation was drawn up by a certain Jacobus Antonie Britz (" Britz"), the operation manager and forwarded to the defendant. An order was then drawn and faxed by the executive of the defendant. Later that afternoon a 200 ton fully hydraulic mobile crane was dispatched to the Eskom's Wes Glass Sub-station site in Ga-Rankuwa, North West Province. The designated

crane operator was Edward Wetso Mathibeli, an employee of the plaintiff. The crane arrived on the site at approximately 16: 30. The uplifting commenced at approximately 01:00 on 22 November 2012. The designated supervisor/rigger was Solomon Ratekane Thekiso ("Thekiso"), an employee of SPM. When an attempt was made to uplift the replacement transformer, the boom of the crane tipped and fell over. The boom was damaged. The boom was salvaged, and transported to the plaintiff's yard in Alrode. The three cranes and some five employees of the plaintiff were involved in the recovery . The crane was out of commission from 22 November 2012 until 11 August 2013. The boom was sent to Europe for repairs. The crane became profitabily operational on 12 August 2013.

[5] The plaintiff's claim against the defendant is for the breach of contract, damages or loss of income suffered when the crane was inoperable, and recovery and repair costs.[1]

[6] The defendant dispute the applicability of the plaintiff's general terms and conditions[2] to the agreement[3] was signed by both parties. It also contends that the cause of the damage was the unauthorised conduct of Mathibeli, plaintiff's employee. The defendant alleges that the employee was at the time on his own frolic.

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[1] *Paragraphs 8 to 11 of the plaintiff's particulars of claim (Pages 8 – 12 of the bundle "A").*
[2] *Pages 44 – 50 of the Merit Bundle "E", Annexure "B" to the Particulars of Claim.*
[3] *Annexure A to the particulars of claim– Page 12 Bundle "A" and Page 43 of Merit Bundle"E"..*

[7] The facts delineated in the factual matrix section above are common cause. The exception is only insofar as they relate to the following items, namely;

1. the applicability of the plaintiff's general terms and conditions of hire to the contract concluded on 21 November 2012;
2. the measure taken to salvage the boom; and
3. the costs of the recovery and repairs.

It is also common cause that pages E 44 – 50 of the merits bundle were not signed, discussed by the parties nor communicated to the defendant at any stage prior to the institution of these action.

[8] The dispute between the parties may conveniently be divided into three categories. First, whether the plaintiff's generic terms and conditions which were not communicated to the defendant govern the contractual relationship between them. Secondly whether the quantum claimed is reasonable. Lastly, whether the measures used were strictly necessary to mitigate the loss. The later would include the deployment of some three crane and five employees. The plaintiff submitted that I should make the general terms applicable to the facts of this case.

[9] The documents that are strictly necessary for the determination of the dispute are the job contract (one page), the plaintiff's general conditions for hire, the repair cost (**annexure "D"**) to the particulars of claim, and the joint minutes recorded by the experts.

[10] The plaintiff relied on the *viva voce* testimony of Tapinos, the regional director of the plaintiff responsible for Southern Africa region, Britz , the operation manager of the plaintiff, EP Santana, the owner of Santana Plant Hire and R Greenwood an expert on crane recoveries.

[11] Tapinos testified that he joined the industry long time ago. He has travelled through various divisions in the industry to his current position. He is now the director of the plaintiff responsible for Southern Africa. On or during 21 November 2012 he received an inquiry from Hobgan of the defendant. He and Hobgan have known one another for a long time and they had worked together at the plaintiff. He was able to assist. He instructed Britz to handle the transaction. That is the extent of his participation until after the accident. He testified that it is competitive and the aim is to satisfy and retain their clients. In the exercise to retain clients, they even misled their competitor. He stated that hiring a crane for onward hiring is common in the industry. He stated that the plaintiff's terms and conditions of hiring are based on the CPHA[4] standard contract. During the early morning of 22 November 2012 he received information about the accident. He proceeded to the site and was involved in the assessment and the recovery of the asset. Britz evidence corroborated the version above. He testified that on 21 November 2012 he received instructions to deal with the order. He was provided with the specifications and he drew the quotation which was followed by an order. The relevant crane was dispatched to the site. During the morning of 22 November 2012 he received information about the accident and the

[4] *See Pages 110 – 126 of the Merit Bundle "E".*

damage. He went to the site and commenced with the recovery as well as the completion of the task for which the crane was hired for. Santana testified that during the period 28 November 2012 until 1 August 2013, he hired his cranes to the plaintiff. He confirmed that the industry is competitive and corroborated the secrecy practice. Finally Greenwood testified as an expert for the plaintiff that in his view the recovery plan used by the plaintiff was correct and that the amounts claimed are both necessary and reasonable. He expressed some reservations about some practical expertise of the defendant's expert.

[12] The defendant relied on the viva voce testimony of Hobgan, the sole member of the defendant, Thekiso and J Lugt, the expert on crane recoveries. Hobgan testimony is that during November 2012 he approached Tapinos for a crane hire. He provided the specification and received a quotation. He signed the first page of the quotation and received an order. He was not provided with the terms and conditions. The next day he received the news of the accident. Thekiso testified that he was present when the crane came. He testified that the crane was used to remove the faulty transformer from the plinth. When the crane was about to commence with the uplifting the replacement transformer into the enclosure there was an explosion. Upon his investigation he saw debris. He ordered the operation to stop and returned to his bakkie. He then heard a noise. He discovered that the extended boom and been damaged when the operator started operating the crane. Finally J Lugt confirmed this information about his curriculum vitae. He testified that in his opinion the recovery costs are highly exaggerated and the time to effect repairs was inordinate

[13] The assets involved in this matter are expensive. They are in demand in the building industries sector, in the shipping industry and the construction of the enegery industry infrastructure . The latter involves the construction of electrical power stations . Accordingly, their hiring and use require some considerable attention.

[14] The contract between the parties is one of letting and hiring. The agreement must satisfy the elements necessary for the establishment of a valid contract. The *res* is the Terex demag AC 200 crane. The duration period for the contract was one day only – 22 November 2012. The rentals payable were agreed. These items are record. It is singed by the representatives of the parties.

[15] The plaintiff's general conditions for hire are stipulated in Annexure "B"[5] to the particulars of claim. The plaintiff urged me to apply them to the their agreement. The plaintiff relies particularly on two clauses; namely clauses 3 and 7.

[16] Clause 3 thereof provides that:

> "-<u>no cession or subletting</u>
>
> The **hirer** shall not cede or assign this agreement nor sublet, mortgage or in any was encumber the crane, or part with possession thereof and shall be obliged to retain the crane on the site an, save for the purpose of returning to the owner, shall neither remove nor allow it to

[5] *See pages 13 to 19 of Bundle "A"*

be removed from the site without first obtaining the written consent of the owner."

Clause 7 deals with the supervision of the crane operator. It provides that:

> **"-Hirer's supervision of operator**
>
> 7.1 Whilst on the site the operator shall be under the sole and absolute control and supervision of the **Hirer** who shall be responsible for all the operator's acts or omission. The **Hirer** warrants and undertakes that it will give to the operator clear and specific instructions and directions for all work to be performed by the operator and the crane site.
>
> 7.2 The **Hirer** shall be obliged and warrants that it will supervise or will provide responsible and competent supervision for the operator whilst the crane is on site during the period of hire. The **Hirer** warrants and undertakes that all instructions will be lawful and in compliance with applicable safety standard and amendments governing the industry from time to time.
>
> 7.3 The **Hirer** w ill not permit or allow any other person than the owner's operator supplied with the crane to operate the crane for whatsoever reason.
>
> 7.4 It is the sole responsibility of the **Hirer** to ensure that the operator complies with all preliminary requirements of the site owner or customer."[6]

As stated above the plaintiff argued for the extension of the terms to the agreements. This submission is based on the authority of Bauermeister v Cope[7]. The submission is fraught with serious difficulties. In that case the issue was an item which was governed by the provisions of the Hire

[6] *Pages 46 of Bundle "E" see also Pages 113 - 141 of bundle "...".*
[7] *1980(2) SA 487 (KPA)*

Purchase Act. It is therefore distinguishable. *In casu* we deal with the ordinary contract of letting and hiring.

[17] The second difficulty relates to the terms and conditions. The parties did not sign the terms and conditions. The defendant did not receive the copy until after the institution of the claim. This is common cause . The only document that was signed by the parties is the job contract. The job contract is only one page long. At the bottom thereof it is noted that:

> "-your order is subject to our general terms and condition which **is available on request**, acceptance of the crane on site implies acceptance of all terms and conditions stated on this acknowledgment."[8]
>
> (The bolding is mine for emphasize)

The quotation document which relate to the relationship reiterate the following:

> "-This offer and acceptance is made strictly subject to and in accordance with our standard Terms and Conditions of hire (**a copy of which is available at your request**) and such Terms Conditions are subject to any provision in this offer to the contrary."[9]
>
> (The bolding is mine for emphasize)

The two statements demonstrate that the terms and condition can be obtained after the conclusion of the contract. Accordingly, these terms

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[8] *See page 43 of the merits Bundle "E".*
[9] *See Page 39 of the Merits Bundle "E"*

must be excluded because the *animus contrahendi* on those terms was missing at the time of conclusion of the agreement.

[18] The evidence of the Tapinos, Britz and Hobgan have shown that they did not focus on any other aspects of the agreement than those mentioned in the job contract. These clauses establish that the terms and conditions were not communicated to the defendant nor discussed at all. They were available on request.

[19] The total evidence show that the parties did not apply their minds on the terms and conditions at all. Tapinos and Hobgan discussed the specifiactions of the crane needed, the period of the need and the rentals payable and nothing more. Accordingly, the principle that *expressum facit cessare tacitum* must apply[10]. The court must not create the agreement for the parties.

[20] The failure to agree, sign and dispatch the terms and conditions of the agreement have some profound consequences. The argument by the plaintiff that the defendant knew that they were subjecting themselves to CPHA term and conditions must be rejected . In Home Fires Transvaal CC v Van Niekerk and Another it was held that:

[10] *See Homes Fires Transvaal CC v Van Wyk and Another 2002 (2) SA 375 WLD at 381J– 382D*

> "-In short, the contract which arose in consequence of the appellant's offer and the respondents acceptance thereof falls to be approached on the basis that the terms on the reverse side of the order were not intended to form part thereof."[11]

[21] The second difficulty is the terms themselves. The evidence is that Tapinos knew that the crane was going to be rehired by the defendant to a third party. However, the identity was not disclosed. The terms clearly prohibit subletting.[12] In fact this prohibition is found in the generic contract of the association and the defendant. Although the plaintiff was invited to comment thereon it avoided to do so.

[22] Hobgan was adamant that if subletting was forbidden he would not have agreed thereto. He was adamant that Tapinos knew that it was going to be rehired to a third party. These uncontested evidence of the defendant further negates the submission that the terms should be extended to this agreement.

[23] The defendant contends that the plaintiff's general conditions for hire apply to the different scenario. Such a scenario would include where an end user approaches the defendant directly. By way of example, where the builder requires a crane to hoist the material on the building site. In that event he will be prohibited from subletting.

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[11] *2002(2) SA 375 WLD at 381J-382 D*

[12] *See paragraph 16 supra.*

[24] Therefore, the interpretation of the factual situation points to the exclusion of the terms. It is not in dispute that there was limited interaction between Hobgan, Tapinos and Britz. The parties adopted a relaxed or a supine attitude. What matters was the job contract and nothing else. That being the case there is no substance in the submission that the court should apply the terms and conditions. The principles are clear. The court should not create the contract nor the terms for the parties.

[25] The contention of the defendant has merit. The submissions make business sense. First, it is supported by the evidence of Tapinos, Hobgan and Santana. These witnesses corroborated each other about the rehiring practice *inter se*. They were all involved in the rehiring at one point or another and the practice is common place. The plaintiff's submission must fail. The conditions can find no application in the facts of this case.

[26] However, the fact that the conditions do not apply does not mean there is no agreement. Tapinos and Britz on behalf the plaintiff created a contract with the defendant. Hobgan does not deny the existence of the contract. The essence of his argument is that he was going to rehire the *merx* to a third party. The plaintiff's witnesses do no dispute this fact. Their lame argument advanced is the non-disclosure of the third party. This was point was not seriously persuit. Therefore, the parties' relationships stands to be governed by the common law principles. By the same token the defence of **"own frolic"** will be determined in terms the principles of common law of employer and employee.

[27] The critical question is who was the employer of the crane operator, Mathibeli. The plaintiff relies on the provisions of clause 7.[13] It contend the defendant was the employer. This submission is misplaced. I have already found that the terms and conditions cannot be made applicable. The reasons given in paragraph 17 *supra* apply *mutatis mutandis* . The crane operator was the common law employee of the plaintiff. Accordingly his employer is liable for his liable for any wrongs he in the course and scope of his employment.

[28] At common law the defendant and SPM had an obligation *vis-à-vis* the hired crane and the plaintiff. They were particularly obliged to take proper care of the crane and expected to use it for the uplifting of the transformers. They were obliged not to abuse, destroy, abandon, and or misused the crane. Finally, they were expected to deliver, it in the same condition to the plaintiff, reasonable wear and tear excepted. These are obligations created by common law. For the plaintiff to succeed it must prove negligence on the part of the defendant and or SPM.

[29] The evidence Thekiso is not contested. During the process of uplifting there was a loud bang. He investigated and observed t he debris. He immediately ordered the uplifting to stop and did indeed stopped. He instructed the crane operator to summon the mechanic or another crane. He then proceeded to his bakkie which was in the vicinity. Mathibeli then commenced the operation . He was not instructed by the rigger to continue. The criticism that he was not in possession of the an operator's

[13] *See paragraph 16 above.*

licence does not make him unfit. He has received internal training which, in my view qualified him.

[30] The plaintiff has proved the damage. I was urged to find that the crane operator was the cause of the damage to the boom. As stated above, the plaintiff is at common law the employer. The plaintiff relied on the provisions of clause 7.[14] It contended the defendant was the employer. This submission is misplaced. I have already found that the terms and conditions cannot be made apply on this submission . The plaintiff is therefore liable for the damages caused by the employee and not the defendant.

[31] Greenwood criticised the conduct of Thekiso. He testified that the rigger should have done more. The rigger caused the operation to stop. In my view the criticism is unreasonable. On the whole Greenwood testimony is unsatisfactory and cannot be relied upon. Furthermore on the whole I find that he was bias in favour of the plaintiff. Unlike Lugt who testified on behalf of the defendant, he was reluctant that the employment of three cranes and five personnel for the recovery was unreasonable. The duty of an expert witness is to assist the court regardless of the party who called him.

[32] The plaintiff has failed to call the crane operator to testify. No explanation of such failure was given. Such failure has consequences. Accordingly, the defendant has submitted that I should draw negative

[14] *See paragraph 16 above.*

inference for their failures to call him. The operator could have contributed significantly.

[33] The legal implications for the failure to call an available witnesses has received several judicial attention. The approach has been stated in various decisions. It is stated that:

> "-....where a party fails to call as his witness one who is available and able to elucidate the facts, whether the inference, that the party failed to call such person as a witness because he feared that such evidence would expose facts unfavourable to him, should be drawn could depend upon the facts peculiar to the case where the question arises"[15]

The defendant's version is that the crane operator caused the accident. This version testimony of Thekiso is not challenged. The end result is that the plaintiff failed to prove that the terms and conditions should be incorporated in their agreement. Similarly, the plaintiff failed to prove negligence on the part of the defendant or SPM.

[34] Accordingly, it must be held that the parties did not intend conditions to be part of their agreement. They thought the contract was only for a short duration and took a chance that by the law of the average nothing adverse will happen.

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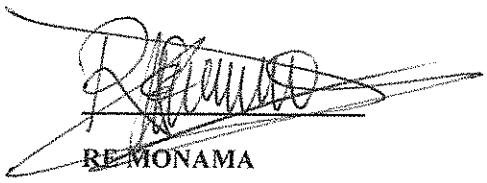
[15] *Munster Estate (Pty) Ltd v Killarney Hills (Pty) Ltd 1979(1) SA 621 AD*

[35] The plaintiff must prove its case. It has failed to do so. Having found that the plaintiff failed to make out the case it is unnecessary to deal with the remainder of the issues. The costs must follow the results.

[36] Accordingly I make the following order, namely

The plaintiff's claim is dismissed with costs.



RE MONAMA

JUDGE OF THE HIGH COURT

GUATENG LOCAL DIVISION

Appearances

Counsel for the Plaintiff:	Adv. K Bailey SC
Instructed by:	Rene Kyriakou Attorneys, Johannesburg
Counsel for the defendant:	Adv. R Stockwell SC
Instructed	Knowles Husain Lindsay Inc. Sandton, Johannesburg
Date of hearing:	29, 30, January and 2, 3 February 2015
Date of judgment:	13 March 2015