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**HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

CASE NO: 21672/2014

(1) REPORTABLE: NO.
(2) OF INTEREST TO OTHER JUDGES: NO.
(3) REVISED.
DATE: 21 JULY 2021
SIGNATURE

In the matter between:

METAL TECHNICS (PTY) LTD

Plaintiff

and

RNS TRUCKING CC

First Defendant

HENDOR TRANSPORT CC

Second Defendant

J U D G M E N T

This matter has been heard virtually and otherwise disposed of in terms of the Directives of the Judge President of this Division. The judgment and order are accordingly published and distributed electronically.

DAVIS, J**[1] Introduction and the parties**

- 1.1 The plaintiff is a company which is contracted by, inter alia, ABSA to upgrade ATM-Machines and thereafter to deliver same.
- 1.2 The defendant is a family run close corporation, operating as a transport company. The letters comprising its name are the initials of Mr Suliman, his son and the “S” initial is shared by Mrs Suliman and their daughter. The defendant has been in operation for 21 years.
- 1.3 The third party has been joined by the defendant in terms of Rule 13 in 2015. It is a freight forwarding and transport close corporation. It was on instruction from the third party that the defendant had transported five upgraded ATM machines in respect of which the plaintiff bore the risk of loss or damage.

[2] Separation

By agreement between the parties, the issues as between the plaintiff and the defendant and the defendant and the third party were separated and the matter proceeded only in respect of the plaintiff's claim.

[3] The plaintiff's claim

- 3.1 It is not in dispute that the plaintiff bore the risk of five ATM machines which it had upgraded for ABSA and in respect of which it had provided safe cladding. The particulars and serial numbers of the ATM machines are also common cause.
- 3.2 On 28 March 2013 and whilst the defendant was conveying the ATM machines and at an intersection of the R103 and R550 at Heidelberg,

Gauteng, a collision occurred between the vehicle conveying the machines and a Toyota Quantum vehicle.

- 3.3 The driver of the Quantum has provided an affidavit which has been accepted in terms of Rule 38, indicating that, at the four-way stop intersection in question, the defendant's truck, being driven at a high speed, entered the intersection without stopping, causing the collision.
- 3.4 Having regard to the expert notices filed, which have been confirmed by way of an affidavit, also accepted in term of Rule 38 and as apparent from photographs and quotations, the ATM machines were damaged way beyond economical repair.
- 3.5 Pursuant to the abovementioned damage, the plaintiff had to pay ABSA the costs of the machines in an amount of R 1 095 033,50. Both the costs and the payment were also confirmed by the plaintiff and ABSA by way of separate affidavits, also accepted in the abovementioned manner.
- 3.6 The plaintiff is not claiming for its own loss and damages relating to the upgrade of the machines and profit. It merely seeks to recover what it had been obliged to pay ABSA.

[4] The defendant position

- 4.1 The defendant was not legally represented at the trial and in fact not even at the most recent pre-trial conference held on 6 July 2021.
- 4.2 At the said pre-trial conference, an erstwhile member of the defendant, Mrs Suliman represented the defendant. On all the issues raised, she indicated that she would obtain legal advice and revert within a week.

- 4.3 At the hearing, Mrs Suliman again appeared. As indicated, she was no longer a member of the defendant and the managing member, Mr Suliman could not attend as he was engaged slaughtering a sheep for the celebration of Eid-ul-Adha.
- 4.4 Mrs Suliman also indicated that the recent spate of public unrest, violence and looting prevented her from obtaining the legal advice she had promised.
- 4.5 Counsel for the plaintiff pointed out that a legal entity such as a company or close corporation may not conduct a case in the High Court except by appearance of a legal practitioner with right of appearance. Reliance was placed in this regard on *Manong & Associates (Pty) Ltd v Minister of Public Works and Another* 2010 (2) SA 167 (SCA).
- 4.6 The learned judge of appeal however also in the aforementioned case held that cases might arise where the administration of justice might require some relaxation of this general rule. Even though there was no “properly motivated, timeously lodged formal application” as envisaged in that judgment before me, I, in the exercise of my discretion and in the interests of justice, allowed Mrs Suliman to represent the defendant and address the court.
- 4.7 Mrs Suliman impressed me as an astute businesswoman. She acknowledged the contents of the plaintiff’s affidavits referred to above and conceded that the defendant did not have any witnesses who would be able to controvert the contents of the affidavits. She stated that the defendant does not intend calling any witnesses.

- 4.8 Instead, she referred to the facts pleaded in the third party notice and questioned why the plaintiff had not, either before or after the institution of the action, chosen to pursue or have the defendant pursue a claim against its insurer for the R500 000,00 insurance cover in existence at the time. The insurer had not taken over the defendant's defence by way of subrogation but had initially paid half of the defendant's legal costs. Either the insurer or the defendant's broker has since gone out of business and it appears that this option has for many years not been pursued and may no longer be available.
- 4.9 The issue of the defendant's insurance is, as far as the plaintiff is concerned, legally *res inter alios acta*, that is to say, it is a matter between the insurer and the insured. The plaintiff cannot itself claim from the defendant's insurance company.
- 4.10 The defendant still has the option open to it to pursue its indemnity against the third party.
- 4.11 A tearful Mrs Suliman explained that the defendant's business has, due to the many economic hardships of the past year, including those imposed by the Covid-19 "lockdown", been brought to the brink of its existence. It has, for example only approximately R7 000 left in its bank account.

[5] Conclusion

- 5.1 Counsel for the plaintiff expressed his sympathy for the position of the defendant and its members as well as Mrs Suliman. He pointed out that, despite the grounds mentioned in the third party notice, no offer of settlement had been made over the course of more than six years of litigation and that the plaintiff is entitled to an order in its favour, having regard to the evidence presented. On a moral, as opposed to a legal

ground, the plaintiff might engage with the defendant regarding payment or execution after judgment, but this is as far as counsel, being constrained by his instructions, could submit.

- 5.2 Whilst the court equally has sympathy for the plight of the defendant, I am duty bound to apply the law to the facts before the court. Doing so, I find that the plaintiff is entitled to the order it seeks, for which it has furnished the court with a draft order.

[6] Order

- 6.1 The defendant shall pay an amount of R1 095 033.50 (one million and ninety-five thousand and thirty-three rand and fifty cents) to the plaintiff's attorneys, Savage Jooste & Adams Inc, in settlement of the plaintiff's claim against the Defendant, by direct transfer into their trust account with the following details:

NAME:	SAVAGE JOOSTE & ADAMS INC
BANK:	STANDARD BANK
ACCOUNT NUMBER:	[....]
ACCOUNT TYPE:	ATTORNEYS TRUST ACCOUNT
BRANCH:	PRETORIA
BRANCH CODE:	010045
REFERENCE:	WS1809/3333363

- 6.2 Interest on the aforesaid amount at the prescribed rate from time to time per annum a tempore morae from date of summons until date of payment;

6.3 Payment of the plaintiff's taxed or agreed party and party costs, which costs shall include the following:

6.3.1 The fees of senior – junior counsel on the High Court scale;

6.3.2 The reasonable taxable costs of obtaining expert reports from the plaintiff's expert (including addendums thereto), which were furnished to the defendant, namely the report of Mr Jason Felix

N DAVIS
Judge of the High Court
Gauteng Division, Pretoria

Date of Hearing: 21 July 2021

Judgment delivered: 21 July 2021

APPEARANCES:

For the Plaintiff: Adv. S G Maritz

Attorney for Plaintiff: Savage Jooste & Adams Inc, Pretoria

For the 1st Defendant: Mrs Suliman (in person)