

THE FILM EDITORS (PROPRIETARY) LIMITED
(FORMERLY TREVOR HILL POST PRODUCTIONS
(PROPRIETARY) LIMITED)

Appellant

and

CINE POWER (PROPRIETARY) LIMITED

Respondent

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

THE FILM EDITORS (PROPRIETARY) LIMITED

Appellant

(FORMERLY TREVOR HILL POST PRODUCTIONS

(PROPRIETARY) LIMITED)

and

CINE POWER (PROPRIETARY) LIMITED

Respondent

Coram: KOTZÉ, VILJOEN, NICHOLAS, JJ A et SMUTS et

GROSSKOPF, A JJ A

Heard: 12 March 1984

Delivered: 27 March 1984

J U D G M E N T

KOTZÉ, J A :

At the commencement of the hearing of this appeal

the late filing of the record was condoned. By consent and by reason of the order to be made on the appeal no order of costs is made in regard to the application for condonation.

At a trial in the Witwatersrand Local Division before THERON, J the appellant company (previously known as Trevor Hill Post Productions (Proprietary) Limited) and which I shall call "the plaintiff" adduced the evidence of a number of witnesses and closed its case. Counsel for the respondent company, which I shall call "the defendant", applied for absolution from the instance without closing its case. The learned Judge granted the application with costs. From this order the plaintiff now appeals. Accordingly, applying the rule in Gascoyne v Paul and Hunter, 1917 TPD 170,

the question now to be determined is whether there was at the close of the plaintiff's case evidence on which a reasonable man might find for the plaintiff. (See also Gafoor v Unie Versekeringsadviseurs (Edms) Bpk, 1961(1) S A 335 (AD) at 340).

The case concerns the sale, during January 1978, by the defendant to the plaintiff of a Moviola 35 mm editing table at a purchase price of R16 500,00 which, admittedly, was duly paid. The plaintiff alleged, and this was common cause, that it was a term of the agreement of sale that the editing table would function efficiently as an editing machine giving a high quality picture and that it would be suitable for the purpose for which it was required by the plaintiff...../4

plaintiff. An editing table has a dual function.

(a) It is used in the process of editing cinematographic film, that is, cutting and piecing together lengths of film in order to make a film suitable for cinema or television projection; and in the process of synchronising the film with background music and other sound effects.

(b) It is used for the viewing of the film by the clients for whom it is produced, to enable them to determine its acceptability. The gist of the plaintiff's cause of action for the repayment of the purchase price against return of the machine and for damages is set out as follows in paragraphs 8 to 11 of its particulars of claim.

"8 (a) At all times material hereto
and in particular at the time
when the said editing table

was delivered to the Plaintiff
the same was materially defective in the following respects:-

- (i) It did not operate efficiently as an editing machine.
- (ii) It caused damage to films during the course of operation.
- (iii) The film transport and sprockets were excessively noisy.
- (iv) The optical lenses became covered with film dust.

(b) The said defects were material and were due to faulty design of the said editing table.

9. (a) By reason of the aforesaid defects the said editing table was rendered wholly unsuitable for the Plaintiff's purposes or for use as such.

(b) By reason of the said defects the Plaintiff, as it was entitled to do, rescinded the aforesaid

agreement...../6

agreement and tendered to return the editing table to the Defendant and claimed repayment of the aforesaid purchase price in the sum of R16 500.

- (c) The Defendant has refused to accept the return of the said editing table or to pay to the Plaintiff the aforesaid sum of R16 500 or any part thereof.

10. Alternatively to paragraph 9 above:-

- (a) By reason of the aforesaid defects, at all times material hereto the value of the editing table did not exceed the sum of R1 000.

- (b) In the premises the Defendant is obliged to refund to the Plaintiff the sum of R15 500 being the difference between the said value and the aforesaid price of R16 500.

11. (a) As a direct consequence of the aforesaid defects and the inability of the Plaintiff to use

the...../7

the editing table for the purpose intended, the Plaintiff has suffered damages in the sum of R3 583,00, being hire charges incurred for other equipment while the said machine was incapable of being used.

(b) At the time of the aforesaid agreement of sale, it was within the contemplation of the parties that the Plaintiff would suffer damages of the said type if the said machine was defective."

The date upon which the agreement was rescinded was 27th February 1979.

The plea raises several defences. For present purposes, however, the sole and crucial issue to be considered turns on the denial by the defendant of the above

quoted...../7(a)

quoted allegations and the finding by THERON, J that the
plaintiff "has ... not established prima facie, or at all,
that there was any structural defect in this machine, nor
that it suffered

any...../8

any damages, nor that it is entitled to a reduction in the purchase price."

The rule in Gascoyne v Paul and Hunter is a strict one - so strict that it has, for instance, been remarked that an application of the type now under consideration "can be successful only in the clearest possible cases" - per PITTMAN, J in Myburgh v Kelly, 1942 E D L 202 at 207.

A court of first instance refusing such an application should as a rule avoid "unnecessary discussion of the evidence, lest it seems to take a view of its quality and effect that should only be reached at the end of the whole case" and "on appeal it is generally right for the Appellate Tribunal, when allowing an appeal against an order granting absolution

at the close of the plaintiff's case, to avoid, as far as possible, the expression of views that may prematurely curb the free exercise by the trial Court of its judgment on the facts when the defendant's case has been closed" - per SCHREINER, J A at p 340 D-E in Gafoor's case, supra.

Having read and carefully considered the evidence and the several exhibits placed before the Court a quo on behalf of the plaintiff, I am of the view that the application for absolution from the instance in the Court a quo should have failed. Having regard to the remarks of SCHREINER, J A quoted in the preceding paragraph the less said about the quality of the evidence the better. I accordingly propose to avoid a full consideration of the vast body of evidence...../10

evidence led at the trial which extends over nearly 500 typed pages and to indicate by reference to an admission by the defendant and to a few brief portions of the evidence (without passing any comment on the cogency or weakness thereof) why, in my view, there is sufficient reason to conclude that a reasonable man might find in favour of the plaintiff in regard to the allegations in paragraph 8 of the particulars of claim.

A. The admission.

The editing table was delivered to the plaintiff during June 1978. Prior, a director of the plaintiff, testified that on the 6th September 1978 he addressed a letter to the defendant in which were listed the following eleven

faults...../10

faults which the table manifested:

- "1. Left front brake drum has fallen out once.
2. Left centre brake drum has fallen out three times.
3. Picture pull down roller came loose and damaged a transmission print.
4. Forward button sticks.
5. Picture lamp fan does not cool lamp sufficiently resulting in very short lamp life.
6. Various fuses repeatedly blowing, we have replaced approximately fifteen fuses since installation.
7. Lens in both modules supplied falls out.
8. Original picture module very very noisy, scratched picture.
9. Replacement picture module equally noisy, picture quality very poor in comparison with original module.
10. Front sound module looses tension. ?

11. Optical sound rows badly."

The letter continued:

"We feel that a machine of this sophistication and expense should not have these problems and if they do occur you should sort them out."

Prior further testified that the editing table was thereafter returned to the defendant in order to have repairs done to it as "intermittent problems" were experienced "from time to time". He handed in a telex dated 23rd November 1978, i.e. shortly after the table had been returned for repair, in which Hill, plaintiff's managing director, set out a series of faults existing as at that date. One of the faults referred to was that the table caused the films to be

scratched...../12(a)

scratched and some of the films so scratched were sent to
the defendant for inspection. Prior thereafter handed into
Court a telex dated 24th November 1978 addressed to the
plaintiff by the defendant which contained an extract from a

telex...../13

telex sent by the defendant on that day to the American manufacturer of the editing table (Magnasync Moviola Corporation). The extract reads:

"FURTHER THE FILM SLIDE REPLACEMENT FOR TREVOR HILL SINCE WE HAVE REPEATEDLY ADVISED THAT THE MATERIAL USED IN THE MANUFACTURE OF THE 35MM FILM TRANSPORT NOTABLY THE GATE IS OF MOST UNSUITABLE CHOICE AND RESULTS IN NOT ONLY SCRATCHING THE FILM TO HELL AND GONE BUT WILL ALSO CAREFULLY AND CONTINUOUSLY REMOVE ANY IDENTIFYING NUMBERS ON THE EDGE OF THE FILM IN SHORT UNSUITABLE AS WE HAVE PROVED WITH EVERY 35MM TABLE IN SERVICE WE CONSIDER IT A WASTE OF GOOD TIME, EFFORT AND OUR MONEY TO INSTALL FOR A THIRD TIME THIS MOST UNSUITABLE PART PLEASE ADVISE WHAT SUGGESTIONS AND COMMENTS YOU HAVE AND WHAT INTENTIONS MOVIOLA HAVE OF RECTIFYING THE FAULT

WE...../14

WE ARE EXPERIENCING UNBELIEVABLE PROBLEMS WITH TREVOR HILL PRODUCTIONS AND FRANKLY SINCE ALL THE PROBLEMS ARE THOSE OF MANUFACTURE WOULD ACTUALLY PREFER TO HAVE NOTHING FURTHER TO DO WITH EITHER THEIR COMPANY OR THEIR EDITING TABLE"

A reasonable person clearly might construe the above extract, consisting as it does of the defendant's own words, prima facie at least as admissions of

- (a) inefficient operation;
- (b) scratching of film;
- (c) removal of identifying numbers on the film edges;
- (d) unsuitability for use as an editing machine;
- (e) vices due to faulty manufacture.

The learned Judge made no reference to the above telex in his judgment, may well have overlooked its significance and, as a result, might wrongly and prematurely have come to the following finding upon which his judgment appears to be based: "the cause of the scratching as the plaintiff alleged wasn't due to a structural fault". In passing it may be remarked that the allegations in paragraph 8 (b) of the particulars of claim was surplusage and not necessary to the plaintiff's cause of action.

B. The viva voce evidence:

Prior, Hill and Dicks were three of the witnesses who testified at the trial in regard to the materiality

-15(a)-

of some of the above admitted faults.

Prior said that intermittent problems were experienced with the table from time to time. He explained that

the...../16

the removal of identifying numbers on the film edges did occur and that it constitutes a serious defect so far as the matching of negatives with the working print is concerned.

If the identifying numbers are removed the matching exercise becomes very difficult and "incredibly time-consuming and highly expensive". In regard to the scratching of film Prior testified that it constitutes a critical defect since such films are unacceptable to the television authorities and film distribution companies.

Dicks was employed by the plaintiff for a period of two years until May 1979. He is the man who mainly worked with the editing table in question. His evidence was that the scratching was intermittent and often as infrequent as

once in every ten prints. It however continued "until he left the company" and he stated that despite its intermittent manifestation the effect of the defect was such that the table could not be used for what is almost its primary function "which was to show a good quality picture to clients, because we could not run the final films because they would be unacceptable if they had a scratch on them". His view was that the design of the table was faulty "because we weren't having the same problem on any make of table that we used".

Hill, already referred to, also gave evidence in regard to the scratching which, he said, he experienced personally and found to be "severe". He had about five or six prints damaged on the table. The problem was a

"particularly...../18

"particularly frustrating" one and if he was told of it, he would never have contemplated buying the table.

The are other parts of the evidence, especially that of one Frahm, which detract from the evidence of the abovementioned witnesses but there is nothing on the record as it stands to effectively contradict it or to negative the prima facie effect of the admissions contained in the telex of the 24th November. The above and other witnesses gave further evidence in substantiation of the plaintiff's case but I have, I consider, referred to sufficient material to demonstrate that as at the end of the plaintiff's case evidence did exist upon which a reasonable man might find for the plaintiff. It follows that the appeal should succeed. The application that the fees of two counsel be allowed is not acceded to.

The appeal is allowed with costs; the order granting
absolution from the instance is set aside and the case is
remitted to the trial Court for the continuance of the hearing
as from the close of the plaintiff's case. The defendant
must pay any wasted costs incurred by the plaintiff in the
Witwatersrand Local Division in consequence of the appli-
cation for absolution from the instance.

JUDGE OF APPEAL

VILJOEN J A)

NICHOLAS J A)

concur

SMUTS A J A)

GROSSKOPF, A J A)