IN THE NORTH GAUTENG HIGH COURT, PRETORIA /ES

(REPUBLIC OF SOUTH AFRICA)

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: ~~YES~~ / NO.
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ / NO.
(3) REVISED. ✓

DATE 22/9/11 SIGNATURE

CASE NO: A672/2010

DATE: 22/9/2011

IN THE MATTER BETWEEN

RIAAN EYER	APPELLANT (Plaintiff in court *a quo*)
AND	
THREE LIONS PARTS CC (Registration no 2000/029575/23)	RESPONDENT (Defendant in court *a quo*)

JUDGMENT

J.W. LOUW, J

[1] The appellant took his Willys 4x4 Jeep to the respondent on 4 September 2008 for certain repairs to be carried out on the vehicle. He had stopped at the respondent's premises two weeks before and had explained to one Ian, who was apparently in charge of the respondent's business, that he was experiencing problems with the

vehicle's brake lights which were not working, that there were problems with its carburetors and that the battery was not charging.

[2] An appointment was then made for 4 September 2008 for the respondent to carry out the necessary repairs. The appellant dropped the vehicle off at the respondent's premises at about 08:00. At about 09:50 he was telephoned by Ian who told him that the vehicle had burnt out. Ian explained to him that they were on their way with the vehicle to an auto electrician and that they were at that stage in Richards Drive. The appellant immediately drove there, where he found the burnt out vehicle, the fire brigade as well as Ian and one of his workers who had been driving the vehicle when it caught fire.

[3] The appellant thereafter instituted an action against the respondent in the Randburg magistrates court. The cause of action was *depositum*. It was alleged in the appellant's particulars of claim that the secondhand replacement value of the vehicle was R80 000,00, and payment of this amount together with interest was claimed.

[4] The appellant gave evidence himself and also presented the evidence of a Mr Jenkinson, an expert in premature and other automotive failures. His expertise was not challenged and he testified as to the cause of the fire which destroyed the vehicle.

[5] The appellant thereafter closed his case. Respondent then applied for absolution from the instance on three grounds. Firstly, that the appellant had failed to prove that it had concluded a *depositum* contract with the defendant. Secondly, that the appellant had failed to prove that the damage to the vehicle was caused by the conduct of the respondent. Thirdly, that the appellant had failed to prove the *quantum* of his damage.

[6] The magistrate in his judgment dealt only with the third ground, i.e. the issue of *quantum*. He found that the appellant had not proved the value of the vehicle prior to the fire and granted absolution from the instance. This is an appeal against that finding.

[7] It has not been argued on behalf of the respondent that the magistrate should have upheld the application for absolution in respect of the first two grounds. If the argument had been raised, it would, in my view, not have succeeded. The terms required to be pleaded for the claim based on *depositum* were set out in the appellant's particulars of claim and were admitted by the respondent. The *onus* would then have been on the respondent to prove that the damage occurred without the respondent's fault. See: *Stocks & Stocks (Pty) Ltd v T J Daly & Sons (Pty) Ltd* 1979(3) SA 754 (A); *Mercurius Motors v Lopez* 2008(3) SA 572 (SCA).

[8] Returning to the issue of *quantum*. The only evidence in this regard was that of the appellant. No expert evidence was tendered. The appellant's evidence in chief and in cross-examination may be summarised as follows:

(a) He purchased the vehicle from a Mr Zeeman on 20 August 2006 for an amount of R35 000,00. It was a private transaction. Mr Zeeman was not a trader in motor vehicles. The appellant regarded the price of R35 000,00 as a bargain.

(b) He thereafter had the following repair work carried out during the period 2006 to 2008:

Reconditioning the gearbox and torque converter	R 5 130,00
Settings on carburettor	R 684,00
Service	R 102,51
New Goodrich tyres	R 5 072,68
Propshaft and gearbox repair	R 3 477,00
Replace oil cooler	R 3 972,90
Replace battery	R 550,00
Replace various parts	R 6 571,00
TOTAL	R25 560,09

(c) According to the appellant's evidence, the amount which he spent on repairs was R35 000,00 and if that was added to the purchase price of the vehicle, the total amount he spent was "about" R70 000,00.

(d) At the stage when he took the vehicle to the respondent for repairs, he was wanting to sell it and was looking at selling it for a price of R80 000,00.

He arrived at that amount by adding a profit of R10 000,00 for himself to the amount of R70 000,00.

(e) The appellant further referred to the fact that he had gone to Auto Fair in Menlyn, Pretoria where vehicles are displayed for sale by their owners on a Sunday to "give an indication what prices are". He did not say that he put the vehicle on display, only that he spoke to the people at Auto Fair and explained to them that he had spent R70 000,00 and was looking at R80 000,00 for selling it. He did not say what their reaction was, but that would have been hearsay evidence anyway.

(f) He also purchased the *Auto Trader* magazine to get an idea of what the market was willing to pay for a vehicle like this. There were similar vehicles advertised, but vehicles such as these are custom built. He could compare his vehicle's V8 engine to another, but there are different types of V8 engines. His was a Landrover engine.

(g) If one wanted to go into detail, he said, one would have, e.g., to look at what he had spent on new tyres. That is why he got back, he said, to what he had spent to determine the value of the vehicle. In the *Auto Trader*, the prices of Jeeps varied between R60 000,00 and R125 000,00. He thought that R80 000,00 was a reasonable price to replace his vehicle.

(h) He also put a "for sale" notice on the spare wheel at the back of the vehicle. People phoned and asked the price, and he told them that it was R80 000,00. He obviously was not able to sell it at that price before taking it to the respondent for repairs.

(i) The appellant could not say what year model the vehicle was. The Jeep club had told him it was 1960 upwards. He guessed it was somewhere between 1960 and 1970.

(j) He said in cross-examination that the tyres were not in a good condition when he bought the vehicle. He conceded that all the work which had been done to the vehicle was necessary repair work, but he was not able to tell what value those repairs added to the value of the vehicle. He could also not say by how much the vehicle would have depreciated in value from August 2006 to September 2008. In re-examination, he ventured an opinion that it would have increased in value.

[9] It is trite that in an action for damage caused to an article such as a motor vehicle, a plaintiff may claim the difference in value before and after the damage occurred, or the reasonable cost of repair to restore it to its original condition. See *Heath v Le Grange* 1974(2) SA 262 (C); *Toyi v Morrison* 1980(2) SA 705 (TkSC); *Ranger v Wykerd & Another* 1977(2) SA 976 (A) at 992C-F.

[10] Evidence as to the before and after damage value of a vehicle, or the reasonable cost of repairing the vehicle, must be that of a person who is suitably qualified to express an opinion in that regard. The appellant clearly had no expert knowledge of the value of Willys Jeeps of the kind in question. He is a layman in that regard. He was not equipped to assist the court in determining the before and after damage value of the vehicle or the reasonable cost of repairing it.

[11] The appellant also did not attempt to give any evidence of that nature. His evidence was that he believed that the replacement value of the vehicle was R80 000,00. This opinion he based on what the vehicle had cost him in respect of its purchase price and the necessary repairs, adding a R10 000,00 profit for himself. That is clearly not evidence of the kind required.

[12] I mention as an aside that the total costs in respect of the purchase price and the repair costs were not R70 000,00. The total repair costs were, as mentioned above, R25 560,09, not R35 000,00. Furthermore, it does not follow from the fact that it was common cause that the vehicle was not economically repairable that its post-fire value was nil. All that that means, is that it would have cost more to repair the vehicle than what the difference would be between its value before and after the fire. No evidence was presented in respect of the value of the vehicle after the fire. It must at least have had a scrap metal value.

[13] The appellant's evidence, even if he was an expert, did not prove either the difference in the value of the vehicle before and after the fire or the reasonable cost of repairing the vehicle. He just wanted to be paid back what the vehicle had cost him plus a profit of R10 000,00. The magistrate, in my view, correctly held that the appellant had failed to prove the *quantum* of his damage, and correctly granted absolution from the instance. There simply was no evidence to support

the *quantum* of the appellant's claim on which a court might have found for the appellant.

[14] It was submitted in the appellant's heads of argument that no rule exists which requires that damages be proved by a so-called expert in circumstances similar to the case *in casu*. Reliance was placed on the following passage in *Hersman v Shapiro & Co*, 1926 TPD 367 at 379, which was approved in *Lazarus v Rand Steam Laundries 1946 (Pty) Ltd* 1952(3) SA 49 (D) and *Henson v Meyer* 1960(4) SA 520 (T):

> *"Monetary damage having been suffered, it is necessary for the Court to assess the amount and make the best use it can of the evidence before it. There are cases where the assessment by the Court is very little more than an estimate: but even so, if it is certain that pecuniary damage has been suffered, the Court is bound to award damages. It is not so bound in the case where evidence is available to the plaintiff which he has not produced; in those circumstances the Court is justified in giving, and does give, absolution from the instance. But where the best evidence available has been produced, though it is not entirely of a conclusive character and does not permit of a mathematical calculation of the damages suffered, still, if it is the best evidence available, the Court must use it and arrive at a conclusion based upon it."*

[15] The difficulty with this argument is that no evidence was presented to the court below that the appellant's own evidence was the best evidence available, and that no expert evidence was available to prove the value of the vehicle before and after the fire, or the reasonable cost of repairing it. On the appellant's own evidence,

similar vehicles are advertised in the *Auto Trader* magazine. There must therefore be a market for such vehicles. It seems obvious that there must be persons who are sufficiently qualified or experienced to testify as to the market value of such vehicles.

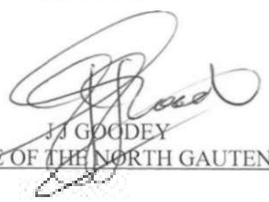
[16] In any event, as I have said, the appellant's own evidence, even if it is the best available evidence, did not establish either the value of the vehicle before and after the fire, or the reasonable cost of repairing it.

[17] In the circumstances, I would dismiss the appeal with costs.

J W LOUW
JUDGE OF THE NORTH GAUTENG HIGH COURT

A672-2010

I AGREE



J J GOODEY
ACTING JUDGE OF THE NORTH GAUTENG HIGH COURT

HEARD ON:
FOR THE APPELLANT:
INSTRUCTED BY:
FOR THE RESPONDENT:
INSTRUCTED BY: