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R FORDRED (PTY) LTD v SUIDWES LUGDIENS (PTY) LTD

MILLER, JA :-

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

R FORDRED (PROPRIETARY) LIMITED Appellant

and

SUIDWES LUGDIENS (PROPRIETARY) LIMITED Respondent

CORAM: *MILLER, VILJOEN, VAN HEERDEN, JJA,*
et GALGUT, NICHOLAS, AJJA.

HEARD: 2 MAY 1985

DELIVERED: 30 MAY 1985

J U D G M E N T

MILLER, JA :-

The appellant, a company having its registered office and carrying on business at Windhoek, was the owner of a Cessna Centurion aircraft which it used in connection with its business. On 5 May 1976 the aircraft crashed in

the Caprivi Zipfel. The appellant instituted action against the respondent for recovery of the loss sustained in consequence of damage suffered by the aircraft in the crash. The amount claimed was R26 000, said to be the difference between the value of the aircraft immediately prior to the crash and its value thereafter.

For reasons which will presently appear, it is unnecessary for purposes of this judgment to set out in detail the grounds upon which it was alleged that the respondent was liable to make good such loss to the appel= lant. It is sufficient to say that the appellant's cause of action was that the respondent, in breach of agreements between the parties, had failed to inspect, overhaul and maintain the aircraft and make it airworthy and that such

failure was the cause of the crash; alternatively, that having undertaken to inspect and to perform certain work on the aircraft the respondent performed such inspections and work negligently, as the result of which the aircraft crashed. The learned Judge in the Court a quo (BADENHORST, JP) fairly summarized the basic issue between the parties thus:-

> "Now whether the matter is approached on the basis of a breach of the agreements ..... or that the work was carried out in a negligent manner the real issue is whether the mechanical fuel pump .... that was in the aircraft .... when it crashed was unservicable at the time of the crash and whether that was ..... the cause of the crash".

After a lengthy trial in which this issue was closely in= vestigated it was held by the Court a quo that the appel= lant had not established that what caused the crash was

any alleged breach by the respondent of any agreement it might have entered into with the appellant or that the crash was caused by the respondent's negligence in any of the respects alleged. This finding notwithstanding, the learned Judge President then posed "the next question", which was "whether the plaintiff has proved the quantum of damages" - a question which, in the light of the finding on causation, it was not necessary to answer. The Court a quo nevertheless answered it, against the appellant. In the result the order made was that the respondent was absolved from the instance, with costs.

It is necessary to mention that at a later stage during the trial, after the closure of the respondent's case but before commencement of argument, an application was

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made by the appellant for a postponement, in order to enable tests to be made of the contents and constituents of a fuel pump for the purpose of placing evidence of the results thereof before the Court. It was contended that the proposed tests would throw considerable light on the issue of causation of the crash. An explanation was tendered of the failure to have carried out the desired tests at an earlier stage. The Court refused the applica= tion. Prior to the hearing of this appeal the appellant lodged with the Registrar of this Court a petition by which leave was sought to submit for chemical tests the deposit and dirt found in a part of the fuel pump and to place before the Court, by affidavit, the results of such tests. It is important to note that neither in its application for

a postponement in the Court *a quo* nor in its petition for leave to place further evidence before this Court, did the appellant seek in any way to supplement or enlarge upon the evidence relating to the *quantum* of damages.

In these circumstances Counsel for the respondent, when the appeal was called, suggested that it would be appropriate and possibly time-saving to hear first the arguments relating to the question whether the appellant had led sufficiently cogent evidence to enable the quantum of damages to be assessed, for if it had not it would be an academic exercise to hear argument upon and to decide the issue of causation and the point raised in the appel= lant's heads of argument, *viz* that the Court *a quo* had mistakenly and irregularly refused the application made to it for a postponement and for leave to lead further evidence relating

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to causation. Counsel for the appellant being amenable to such suggestion and the Court agreeing, full argument was heard on the issue of quantum after which the Court reserved judgment on that issue, indicating to Counsel that in the event of its deciding the issue adversely to the respondent, the parties would be notified and arrange= ments made for the hearing of argument on the remaining issues. It has not been found necessary to hear argument on the other issues and I therefore proceed to deal with the issue in regard to the quantum of damages.

The evidence relied on by the appellant for the discharge of the onus resting upon it to prove the measure of the damages was almost exclusively that of Mr Grellman, a highly qualified aircraft maintenance engineer with over 17 years' experience in the maintenance of aircraft. He

also holds a private pilot's licence. One skilled and knowledgeable in the field of aircraft maintenance is not necessarily knowledgeable concerning the monetary value of the aircraft on which he works and does not by virtue of his high qualifications in the engineering field, necessari= ly gain special knowledge regarding the market prices of aircraft, whether old or new, and whether damaged or undamaged. It is therefore necessary to inquire whether Grellman adequately qualified himself as an evaluator of aircraft. Having stated his qualifications and experience summarized above Grellman testified at length in regard to the issue of causation of the crash and on all matters relevant thereto. Counsel for the appellant then asked him whether, when working for the respondent and later for

another firm, Westair, he had had occasion "to acquire knowledge of the sale of aircraft (including secondhand aircraft) in South West Africa and South Africa". The answer was "not so much" when working for the respondent but that at Westair "we sold a few aeroplanes".

In a written summary of his intended evidence Grellman had said that prior to the crash the aircraft concerned "had a value of R32 ooo based on market value". He was asked in chief upon "what base that kind of assess= ment rested" and whether it was "a reasonable market assess= ment". To this Grellman replied that he thought so and observed that a similar aircraft had some time before been sold for R36 000. Asked about the price of new aircraft "of this kind" the witness said that prices varied and

changed / .....

changed from day to day but that he "imagined" that a new such aircraft would cost about R160 000. He then testified that the virtually undamaged engine of the wrecked aircraft was all that could be salvaged and that it was sold to Westair for R6 000. Westair later sold it to another but the witness had "no idea" what the price was.

This is, in substance, the extent of Grellman's evidence in chief on the question of the quantum of appel= lant's loss. In cross-examination he acknowledged that he had previously worked for Namib Air, (the respondent company's new name) which was the agent for Cessna aircraft in the territory and that throughout his employment there he had in no way been involved in the sale of aircraft and had no knowledge of any trade-in of aircraft.

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He acknowledged that the selling of aircraft was "no part" of his job at Westair or when working for the respondent, but said that in such jobs one overheard what salesmen said and one saw magazines and in that way acquired "knowledge" of what "more or less is the value for an aeroplane". Later he said that in the two years that he worked for Westair he had acquired greater knowledge of aircraft prices and values - during that period of two years Westair had not bought any aircraft but had "sold 7 aeroplanes". When asked for details in this regard the witness said: "Unfortunately I did not prepare myself". He testified to one sale of which he had some knowledge; that sale was of a 1969 model Cessna 210 which had about 1 280 airframe hours. It was sold for what he thought was R36 000. He was then asked:

"Mr Grellman, what would you say the value of a Cessna 210 was in May 1976 with approximately 2 300 hours, airframe hours?"

He answered: "I would not be able to tell you".

The negative answer to this question was in effect an admission that the witness could make no assessment of the value of the appellant's aircraft at the time of the crash, for the description contained in the question would substantially accord with a description of the appellant's aircraft and its airframe hours at the time of the crash.

It is, I think, clear from the evidence I have summarized above that, however suitable Grellman may have been for the purpose of testifying about the condition of the aircraft concerned and its mechanism and about the probable cause of the crash, he was patently miscast as an

evaluator / .....

evaluator for the purpose of proving the quantum of the appellant's loss. There is no justification for granting him the status of an expert in regard to the relevant eva= luations, for there is nothing to show that he has the knowledge and experience necessary to the expression of opinions regarding market values of aircraft of the kind or type and at the time and place concerned, or on other aspects of the issue now under consideration. (See Hoffman & Zeffert SA Law of Evidence, 3rd Ed, p 84; Pitout v North Cape Live= stock Co-operative Ltd 1977(4) SA 842 (AD) at p 854 A - E; Estate Marks v Pretoria City Council 1969(3) SA 227 (AD) at p 254; Phipson on Evidence, 13th Ed, 27-32 at p 572.)

In the light of this finding, evidence of Grellman's opinion as to the value of aircraft, whether generally or

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specifically, or as to the reasonableness or otherwise of the price paid for the engine of the damaged aircraft, is unacceptable as having no weight. (Pitout's case, ibid, and see Hoffman and Zeffert, supra, at p 75 and more particularly at pp 80-1 where rule 401 of the American Law Institute's Model Code of Evidence is quoted as correctly reflecting our law.) Although evidence of the facts related by the witness in conjunction with such opinions (e g that an aircraft was sold for Rx or an offer of Ry was made) is receivable (cf. Cowen & Carter: Essays on the Law of Evidence, at pp 165-6) it is, at best, of very doubtful cogency when the Court has not been furnished with the necessary "criteria for testing" the conclusions reached or which would serve to enable the Court "to form its own

independent judgment" on the matter in issue. (Phipson on Evidence, supra, 27-34, at p 574.) Furthermore, without fairly detailed information regarding the circum= stances of any transaction of sale to which the witness might have testified as a matter of fact, not of opinion or inference, the Court would derive very little, if any, aid from the fact of the transaction in its quest for market value.

It was contended by Mr Gauntlet, for the appellant, that even if the Court had difficulty in making an assessment of the quantum of the appellant's loss, it was very clear that the crash necessarily caused it damage and loss and that therefore, despite the diffi= culties in regard to proof of quantum, it was the Court's

duty to make an assessment, to the best of its ability, on the evidence before it. He relied for this contention on cases such as Turkstra v Richards 1926 TPD 276; Hersman v Shapiro & Co 1926 TPD 367; Erasmus v Davis 1969(2) SA 1 (AD) at pp 8 and 10. I have no doubt that our Courts have accepted as a firm principle that where it is clear that a plaintiff has suffered damages but it is very difficult, if not impossible, on the evidence to make an accurate or reasonably accurate assessment thereof, the Court will do the best it can on the available evidence and with recognition that its assessment cannot pretend to be a closely reasoned or accurate one. But in certain circum= stances the Court will decline a request that it make a rough assessment and will decree absolution from the instance

The true principle was thus formulated by STRATFORD, J, (TINDALL, J, concurring) in Hersman v Shapiro & Co supra, at pp 379 - 380:-

> "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 assess= ment 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 con= clusive 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."

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This passage has been approved and applied by this Court on more than one occasion. (See, for example, per VAN WINSEN, AJA, in Mkwanazi v Van der Merwe and Another 1970(1) SA 609 at p 631 and, more recently, Esso Standard SA (Pty)Ltd v Katz 1981(1) SA 965 at p 970.)

The onus which the appellant, by its claim as pleaded, took upon itself to discharge was what the market value of its Cessna aircraft was immediately after it had come to grief and what its market value was immediately before the mishap. The evidence led fell lamentably short of achieving that object. It was contended on behalf of the appellant that there was no considerable activity in the market place in South West Africa so far as the purchase and sale of aircraft of this or any type was

concerned / .....

concerned and that it was therefore a matter of difficulty to find within the territory an evaluator with knowledge and experience necessary to the making of a reliable assess= ment of the market value of the damaged aircraft or of its value prior to the crash. This may be so but there is no evidence to show that there would have been any difficulty in finding evaluators or assessors elsewhere, and especially in the Republic of South Africa, who had the necessary knowledge and experience. The learned Judge-President in the Court below observed, not without some justification, that the witness Hutchison, who was called from Johannesburg to testify in regard to another issue in the case, might himself have been far better qualified to talk about aircraft values than was Grellman, but was not called upon

to give / .....

to give any evidence about aircraft values. Hutchison was a member of the Institute of Loss Adjusters in respect of non-marine and aviation insurance claims. He said that there were five such loss adjusters of whom he was aware. He personally had investigated, on average, between five and six aviation insurance claims per month and very many more other non-marine claims. The nature of his occu= pation and the degree of his experience in dealing with valuations, betoken familiarity with the market for the purchase and sale of a large variety of objects, including aircraft. There is no substance in the appellant's contention that it would have been very difficult to bring forward better evidence of the relevant values than was given by Grellman. It appears to me that it is highly

probable / .....

probable that the appellant simply assumed that because of Grellman's distinction as a maintenance engineer and the fact that he had expert knowledge of the mechanical condition of the aircraft, he would be capable of giving the evidence necessary to enable the damage to be assessed. If that was the appellant's belief it was a mistaken one which rendered the claim for damages subject to the risk of failure for want of proof of the extent of the loss. This is decidedly not a case in which "the best evidence reasonably available has been produced"; it is rather a case in which evidence was reasonably available to the appellant but not produced. It will be noticed that when applying the dicta of STRATFORD, J, (in Hersman's case) reproduced above, I have in effect qualified the

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word "available" by prefacing it with "reasonably". I notice that DIEMONT, JA, did likewise in the Esso Standard case, supra, at p 970 D - E and H.

Finally, it is necessary to mention an issue relating to radio equipment which was said to have been in the aircraft at the time of the crash. Mr Fordred, a Director of the appellant company, was recalled (after he had completed his testimony on the main issue) for the purpose of explaining that the radio equipment had not been recovered. In the course of giving that explanation he said: "The value that we put on to the radios was R2 000". This represented the evidence regarding the value of the radio equipment. There was no evidence to qualify Fordred as a person with knowledge

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of the value of equipment of that nature. Nor was there evidence as to the condition of the equipment - nor of the identity of the "we" who put the value of R2 000 on it. It was contended on behalf of appellant that since there was no cross-examination of Fordred on this point, his evidence of value ought to have been accepted. In my view the Court a quo rightly rejected that argument. The onus of proving the value of the lost equipment was on the appellant and could hardly be discharged by the bald statement, made in passing, by a wholly unqualified witness, that he and others (who remained unidentified) had put a value of R2 000 on the equipment. In these circumstances a decision by the respondent not to cross-examine the witness cannot be taken to imply acceptance of or acquiescense in

the semi-anonymously determined value.

The appeal is dismissed with costs, which shall include the costs in respect of the petition for leave to lead further evidence.

S MILLER

JUDGE OF APPEAL

VILJOEN, JA)
VAN HEERDEN, JA) CONCUR
GALGUT, AJA)
NICHOLAS, AJA)