b)

IN THE HIGH COURT OF SOUTH AFRICA
[TRANSVAAL PROVINCIAL DIVISION]

NOT REPORTABLE

CASE NO: 32140/2002

DATE: 14/3/2005

In the matter between:

FREITAN (SA) (PTY) LTD PLAINTIFF

and

KINGTEX MARKETING (PTY) LTD Defendant

JUDGMENT

ISMAIL AJ:

[1] The plaintiff instituted proceedings against the defendant for payment of R128 856,61 together with interest at a rate of 19,5% per annum a tempore morae as well as costs of suit. The plaintiff's claim is based on credit facilities which the plaintiff extended to the defendant for freight charges.

[2] Plaintiff submits that the defendant agreed that all contracts entered between itself and the defendant would be subject to the conditions set out in the agreement, to the extent it was not inconsistent with such conditions and the standard trading terms and conditions recommended by the South African Association of Freight Forwarders applied, at the date each contract was entered into, unless the Plaintiff otherwise notified the Defendant in writing prior to that date.

[3] The conditions referred to in the application (for credit) were as follows:

(a) All charges for services to be rendered by the Plaintiff would be according to the quotes submitted and for the account of the defendant;

(b) Interest would be payable on overdue amounts at 4% points above the published prime overdraft rate at Standard Bank Limited from time to time, compounded monthly, whether or not the overdue amount has been finally quantified;

(c) Any costs, including attorney and own client costs, incurred by either party arising out of the other party being in default would be borne by the party in default.

[4] The defendant denied owing the plaintiff the amounts claimed and it instituted a counter claim. The basis of its claim against the plaintiff being that it instructed the plaintiff on or about the 29 August 2002, to ship goods on its behalf to New York, U.S.A. Plaintiff refused to release the goods to the consignee in New York because another account of the plaintiff's remains unpaid. Defendant claimed that the plaintiff was not justified to refuse the release of the goods to the consignee. As a result of the plaintiff's refusal to release the goods to the consignee, or to any other party authorized by the defendant, goods had to be auctioned to defray storage costs. As a result of plaintiff's refusal to release the shipment, defendant incurred damages in the amount of R105 165,62.

[5] The plaintiff called three witnesses to testify during the presentation of its case. They were Mr Dion Ramdin the financial manager of the plaintiff, Ms Jilian Clement the air freight manager and Mrs Vivian Wright. The defendant called Mr Wong a director and shareholder of the company and Mr Leon Malan, an attorney acting on behalf of the defendant to testify.

[6] The dispute in this matter revolved around three cargos which the plaintiff handled on behalf of the defendant. Two shipments were sent by the plaintiff by airfreight and the remaining cargo by sea. These are listed on A8 of the bundle. The issue surrounding the sea-freighted cargo was that the plaintiff prevented the defendant to obtain the cargo or to release it to the nominated consignee. The defendant alleges that the plaintiff withheld the cargo in lieu of amounts which the defendant owed in respect of other transactions. The plaintiff on the other hand contents that the defendant was in possession of the bills of lading and as such in essence was in possession of the 'title deed' to the shipment. The plaintiff could not lay claim to the cargo in New York as it had no documentation authorizing it to do so. The cargo was seized by the United States Customs because it was not cleared within the permitted time and it was sold to defray storage and warehousing costs. This the plaintiff allege was attributable to the fact that the defendant did not want the goods to reach Jeetish Impex ["Jeetish"], the consignee, who was indebted to the defendant. The defendant was endeavouring to obtain new buyers in the U.S. This process took time and for that reason the shipment was not cleared at customs in New York which resulted in the seizure.

[7] In the claim in convention the issue which needs to be determined is whether a contract existed between the plaintiff and defendant. Whereby the plaintiff would freight goods on behalf of the defendant and the latter would be responsible for payment thereof in terms of an agreement

entered between them. This agreement was amplified by the South Africa Association of Freight Forwarders' ["SAAFF'] trading terms and conditions.

[8] Mr Wong the director of the defendant company testified that he applied for credit facilities with the plaintiff and that he concluded an agreement on behalf of the defendant. This agreement is evidenced by document "A2" of the bundle. The document he signed stated -

> *"All contracts entered into between the Applicant and Freitan* S A *[Pty] Ltd. ("the Company") shall be subject to the conditions set out below and, to the extent not in consistent with these conditions, the standard Trading Terms and Conditions recommended by the South Africa Association* of *Freight Forwarders* as *at the date each contract is entered into, except to the extent the Company may have otherwise notified the applicant in writing prior to that date".*

[9] The standard terms and conditions of SAAFF appears on pages 3 - 7 of the document bundle. Several clauses of this document were referred to by both parties during the trial. Mr Wong testified that he did not have sight of this document prior to the events leading to this trial. However, the document he signed, Conditions of Contract "A2", commences with the reference to the SAAFF's terms and conditions. In addition the International Cargo Forwarding Instructions documents [document 23, 159 and 221] make reference to the standard trading condition at the bottom of the page and alongside the column where he signed. When questioned as to why he did not request a copy of the standard trading conditions of SAAFF which were obtainable on request, he answered "I trusted the plaintiff' .

[10] This document assumes significance because the defendant alleges that the contract between them was amended by a subsequent oral agreement, to the effect that the goods would be air freighted to the consignee and that the latter would be responsible for the freight charges.

[11] The plaintiff relies on paragraphs 32 and 33 of the SMFF terms and conditions which deals with 'customer's oral instructions' and 'variation of these terms and conditions'.

Paragraph 32 of the agreement states -

"The customer's instructions to the company shall be precise, clear and comprehensive and in particular but without limitation, shall cover any valuation or determination issued by the customs in respect of *any goods to be dealt with by* or *on behalf* of or *at the request* of *the company. Instructions given by the customer shall be recognized by the company* as *valid only if timeously given specifically in relation to* a *particular matter in question. Oral instructions, standing* or *general instructions* or *instructions given late, even if received by the company without comment, shall not in any way be binding on the company, but the company may act thereupon in the exercise* of *its absolute discretion."*

Paragraph 33 - VARIATION OF THESE TERMS AND CONDITIONS

"No variation or *alternation* of *these trading terms* or *conditions shall be binding on the company unless embodied in* a *written document signed by* a *duly authorized director* of *the company. Any purported variation* or *alternation* of *these trading terms and conditions otherwise than set out above shall be* of *no force and effect whether such purported variation* or

alternation is written or oral, or takes place before or after the receipt of these trading terms and conditions by the customer."

[12] Mr Wong testified that an oral tripartied agreement was entered into between the plaintiff, defendant and consignee telephonically. The consignee requested that the goods should be air freighted as opposed to the original agreement to freight the goods by sea. The consignee undertook to pay the airfreight charges. The defendant altered the documents accordingly and the initial sea freight instructions appearing on bundle "A159" was altered to the new instruction appearing on "A221".

[13] Miss Clements and Vivian Wright testified that the shipments were already sent and they tried to stop it from reaching Jeetish upon the defendant's instruction, however the shipments were already released to the consignee.

[14] When Mr Wong testified he had difficulty and was at pains in explaining why the original instruction at "A 159" was altered to "A221". He stated that an oral agreement was reached between the parties on 5 July 2002 that the consignee would pay the freight charges as opposed to the initial instruction which was CIF. This oral agreement was never recorded or reduced to writing between the defendant and the plaintiff. He stated that the changed instruction appearing on "A221" was sent to the plaintiff on 23 August 2002. This document at the top reflects a fax recordal of September 5, 2002 at 03:14pm. During cross-examination he was asked whether the document was faxed on 23 August 2002 to which he replied "yes". The next question was "there was no further amendment to A221?" The answer was no. He was thereafter asked to look at page 213 which was a letter written on defendant's letterhead that was faxed to the plaintiff. The letter was dated 4 September 2002. The concluding sentence of the second paragraph of the letter reads *"if goods have not*

been cleared and we are able to stop this, we want to amend Freight charges so *Jeetish must pay this qarqo [sic] NOT KINGTEX".*

[15] Had the oral agreement been in place on 5 July 2002 that consignee would pay for freight charges then this letter becomes superfluous. In the absence of an oral agreement this letter makes perfect sense, namely that the terms are being amended so that the consignee becomes responsible for airfreight charges and not the shipper - Kingtex.

[16] Mr Wong was than questioned about document "A150" which is a document on defendant's letterhead address to Jill [Miss Clements employed by the plaintiff]. This letter states - *"Please rectify air freight document* as *to letter* of *credit. All charges must be billed to us, including costs to Jeetish warehouse. Please see copy* of *L/C.* This letter was dated 7 August 2002 and was faxed on the same day. It reflects the time at 02:00pm. Mr Wong was asked to comment on this letter. He answered that it meant that the defendant would only be responsible for costs from airport in New York to Jeetish's warehouse. In other words the land cost of transportation in USA. He was asked to comment on the words *"all costs"* and he persisted with his answer.

[17] The terms and conditions of SAAFF was regarded between the plaintiff and defendant as common cause and operational between them. However the defendant was of the view that the oral agreement could supercede the written agreement. It was therefore surprising to hear Mr Wong testifying that he only became aware of the agreement during the trial. As previously alluded to in paragraph 33 of the agreement, referred to above, is relied upon by the plaintiff that the oral agreement cannot be operational unless reduced in writing by the parties. Navsa JA, in *De Villiers and Another NNO v BOE Bank Ltd 2004* (3) *SA* 1 *(SCA),* stated:

"The validity and binding nature of *an entrenchment clause in* a *written contraction, providing that amendments to an agreement have to comply with specified formalities, were reaffirmed by this court in* ***Brisley v Drotsky 2002*** (4) ***SA* 1 *SCA.*** *Dealing with the motivations for such clauses this Court said the following at* 11*C-F.*

> *'Party doen dit deur vooraf ooreen te kom dat 'n kontrak alleen dan tot stand kom wanneer aan sekere formaliteite voldoen is. Die oogmerk is* om *geskille te beperk* of *uit te skakel. Natuurlik staan did partye vry* om *die formaliteite te ignoreer en te handle asof 'n bepaalde Wet nie bestaan nie. Onstaan 'n dispuut is enigeen geregtig - en die Hof verplig* - om *die strikte reg toe te pas. En hoekom moet die anders wees in vrye kontraksverband? Daar is ook 'n algemene heersende mite dat hierdie tipe bepaling slegs ten bate van die ekonomiese magtige bestaan en dat dit tot ongelykheid in kontraksverband aanleiding gee. Dit is waarskynlik waarom daar 'n beroep op die grondwetlike gelykheidsbeginsel gemaak word. Hierdie bepaling dien ter beskerming van beide partye..."*
>
> "
>
> *pa ve*

A few lines further down at 11F-G the following appears:

> *'Die Shifren-beginsel is "trite" en die vraag onstaan waarom dit, na bykans 40 jaar, omvergewerp moet word? Mens kan jou beswaarlik die handelsgevolge, regsonsekerhie en bewysprobleme wat gaan ontstaan indink ..... ",*
>
> See also **SA Sentrale Ko-op Graanmaatskappy Bpk v Shifren en Andere 1964 (4) SA 760 (A)**

[18] Regarding the claim in convention, I find on the evidence presented that the probabilities favour the plaintiff's contention that there was no oral agreement in place, however, the legal position as stated in the aforementioned cases support this view. A change in the original agreement is permissible by a subsequent oral agreement. Where the original agreement specifies that no variation will be permissible unless reduced in writing than in the absence of the agreement being reduced in writing than the Shifren principle applies namely -

> " A *stipulation or condition in* a *written contract provided that 'any variations in the terms of this agreement* as *maybe agreed upon the parties shall be in writing otherwise the same shall be of no force or effect."* Held that the contract could not be altered verbally.

[19] I am of the view that the plaintiff has on the balance of probabilities shown that the defendant was indebted to it for the amounts claimed.

CLAIM IN RECONVENTION

[20] The defendant's claim in reconvention is based in delict. In paragraphs 6 to 10 the defendant makes the following allegations in support of it's claim:

> "(6) On or about 29 August 2002 Plaintiff Shipped goods on behalf of defendant to New York, United States of America as per "Annexure F3" of plaintiff's declaration.

(7) Notwithstanding demand, Plaintiff refuses to release the said goods as per "Annexure F3" to the consignee in New York, on the basis that another account of the plaintiff remains unsettled. Plaintiff was not justified to refuse release of the goods.

(8) It had never been a terms of any of the said agreements that the plaintiff would be empowered to refuse release of any shipment on account of another shipment not being paid in full.

(9) As a result of the plaintiff's refusal to release the goods to the consignee, or to any other party authorized by the defendant, goods had to be auctioned off to defray storage costs.

(10) As a result of the plaintiff's refusal to release the said shipment, defendant incurred damages to the amount of USD 14 745,60 being the market value of the goods, calculated as follows:

Mock Neck Garments x 2976 @ USD 3.20 = USD 9 523,20

Turtle Neck Garments x 1632 @ USD 3.20 = USD 5 222,40."

[21] Plaintiff's pleaded to the defendant's counter-claim as follows:

AD PARAGRAPH 6

Plaintiff admits that it forwarded certain goods to New York in the United States of America, on the defendant's behalf, during or about August 2002 and that Annexure "F3" relates to such instruction.

AD PARAGRAPH 7

7.1 The plaintiff denies the contents of this paragraph.

7.2 The plaintiff notes that, in the event, the terms of its agreement with the defendant - specifically those referred to in Annexure "F6" - entitle the plaintiff to a special and general lien and pledge over goods, either for monies due in respect of such goods or for other monies due to the plaintiff from the defendant.

AD PARAGRAPH 8

The plaintiff repeats the contents of paragraph 7 above.

AD PARAGRAPH 9

9.1 The plaintiff pleads that the goods were not cleared by the consignee into the United States of America within the requisite period.

9.2 As a result thereof, the goods were seized by the Customs authorities of the United States of America.

AD PARAGRAPH 10

The plaintiff denies the contents of this paragraph."

[22] Mr Ramdin who testified on behalf of the plaintiff, conceded that the plaintiff had no lien in respect of the sea freight cargo which reached New

York. He and Miss Vivian Wright stated that the defendant was in possession of the bill of lading and therefore it was the titleholder of the goods. The reason that the goods were confiscated was attributed to the defendant sourcing a new buyer in the US in view of it not wanting the goods to be delivered to Jeetish. The reason being that Jeetish did not pay the defendant for the two-airfreight shipments.

[23] Mr Ramdin denied speaking to Mr Malan, the defendant's attorney, telephonically as suggested by the latter. Mr Malan's evidence was that he spoke to one Deon, who told him that he was going to release the goods to the defendant and/or its nominee unless the plaintiff receive the full outstanding payment due to it. At that stage a dispute arose between the plaintiff and defendant regarding who was responsible for the airfreight charges. A meeting was held at the defendant's offices regarding these charges and it would appear that the defendant agreed to pay the sum of R36 186,81. Mr Ramdin stated that the amount agreed upon was R67169,17. This amount being the costs of the two shipments if it was sent by sea freight, as opposed to airfreight, together with the amount of R36 186,81.

[24] The question that needs to be answered is, whether the plaintiff was culpable in allowing the defendant's shipment being sold by the US custom authorities. The plaintiff according to Mr Wong and Mr Malan through Mr Ramdin made them believe that he would not release the shipment in New York unless the plaintiff received the full outstanding payment. The overwhelming probabilities favour this view for the underlying reasons:

a) The meeting at the defendant's premises on 11 October 2002 regarding payment of the shipments and Mr Ramdin's view that the

amount of R36 186,81 and the outstanding amount if the goods were sent by sea freight had to be paid.

d) Mr Wong consulted an attorney to intervene on his behalf when Mr Ramdin insisted that all outstanding amounts had to be paid before he would release the shipment.

c) Mr Malan's telephonic discussion with Deon and the insistence of the latter that he was exercising a lien and that the goods would only be released upon payment of the amount.

d) The plaintiff's plea to defendant's counter-claim refers to it exercising a lien or pledge. See paragraph 21 supra.

Mr Ramdin denied the existence of a lien. This begs the question, why did the plaintiff plead that it was entitled to exercise its rights in terms of a lien or pledge and hold the goods if this was not the case?

[25] Mr Ramdin suggested that the goods were seized by the US customs officials because the defendant delayed in clearing the shipment. Even if I were to accept that as the reason for the confiscation, the question is whether the plaintiff was negligent by making the defendant believe that it had control over the shipment and that it was not going to release it. It would appear that this was the case. Even though the plaintiff could not exercise the lien in truth it made the defendant believe that the shipment will not be released unless it was paid in full. This raises the question whether the plaintiff was the cause of the defendant's loss. In other words, the plaintiff should have communicated to the defendant that it had to clear it's own goods. This was not done. On the contrary the impression created was *"we are not releasing the shipment unless we are paid" .*

[26] One can criticize Mr Malan for not noting the date, time and person who he spoke to, his evidence that he spoke to Deon who told him that the good will not be released is accepted by the court. The only person he could have spoken to would have been Mr Ramdin, whose first name is coincidently Deon. Mr Ramdin himself when he testified stated that all calls relating to the account of Kingtex would have been referred to him. On the evidence presented before me, the probabilities favour the proposition that the plaintiff adopted a stance through Mr Ramdin by communicating to Mr Wong and Mr Malan that it was not releasing the shipment rather than telling them that they should do so.

[27] In my view, the plaintiffs conduct caused the shipment to be seized by the US authorities. Corbett CJ set out the test for causation in delict in *International Shipping [ptyJ Ltd v Bentley 1990* (1) *SA 680 (A) at 700E* -I:

> "As has been previously been pointed out by this court, in the law of delict causation involves two distinct enquiries. The first is a factual one and relate to the question as to whether the defendant's wrongful act was the cause of the plaintiff's loss. This has been referred to as factual causation. The enquiry as to factual causation is generally conducted by applying the so- called 'but for' test which is designed to determined whether a postulated cause can be identified as a *causa sine quo non* of the loss in question. In order to apply this test one must make a hypothetical enquiry as to what probably would have happened but for the wrongful conduct of the defendant. This enquiry may involve the mental elimination of the wrongful conduct and the substitution of a hypothetical course of lawful conduct and the posing of the question as to whether upon such a hypothesis the plaintiffs loss

> would have ensured or not. If it would in any event have ensued, then the wrongful conduct was not a cause of the plaintiff's loss, albeit, if it would not so have ensued. If the wrongful act is shown in this way not be a *causa sine quo non* for the loss suffered, then no legal liability can arise. On the other hand, demonstration that the wrongful act was a *causa sine quo non* of the loss does not necessarily result in legal liability. The second enquiry that arises, viz whether the wrongful act is linked sufficiently closely or directly to the loss for legal liability to ensure or whether, as it is said the loss is too remote. This is basically a juridical problem in the solution of which consideration of policy may play a part. This is sometimes called "legal causation."

In ***Minister* of *Safety and Security v Van Duivenboden*** *2002* (6) SA 431 *SCA at 449E,* Nugent JA stated:

> " A plaintiff is not required to establish the causal link with certainty, but only to establish that the wrongful conduct was probably a cause of the loss, which calls for a sensible retrospective analysis of what would probably have occurred, based upon the evidence and what can be expected to occur in the ordinary cause of human affairs rather than an exercise in metaphysics"

[28[I am of the opinion that had the plaintiff told the defendant that the latter should see to it that it attends to the clearance of the shipment at New York harbour it would have done so. However, the plaintiff representation that it would not release the goods as it was exercising it's lien is a probable cause for the loss the defendant suffered. For this reason the defendant's counter-claim succeeds and the plaintiff is ordered to pay the defendant the sum prayed for together with interest. The plaintiff is also

ordered to pay the costs of the defendant's counter-claim save for the cost of 2 hours hearing because a Chinese interpreter was not available.

[29] Accordingly, I make the following order -

(1) The plaintiff's action in convention succeeds and the defendant is ordered to pay the sum of R128 856,6;

(2) The defendant is to pay the costs of the plaintiff's claim in convention;

(3) The defendant is to pay interest at a rate of 15.5% per annum a tempore mora from date of issue of summons to date of payment;

(4) Plaintiff is to pay the defendant's damages in the sum of R105 165,62

(5) To pay interest on the amount of R105 165,62 at a rate of 15.5% per annum a tempore mora from date of counter-claim to date of payment;

(6) Cost of suit of the defendant's counter-claim, save for one afternoon's hearing [2.00 - 4.00pm] due to the unavailability of the Chinese interpreter.

JUDGMENT HANDED DOWN ON 14 MARCH 2005.