




IN THE NORTH GAUTENG HIGH COURT, PRETORIA

[REPUBLIC OF SOUTH AFRICA]

20/5/15

CASE NUMBER: 38968 / 2012

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED.
<u>20 / 05 / 2015</u> DATE	
 SIGNATURE	

In the matter between:

NUCO AUCTIONEERS (PTY) LTD

PLAINTIFF

AND

AXIS HOUSE (PTY) LTD

DEFENDANT

JUDGMENT

MAVUNDLA, J.

- [1] The plaintiff is conducting, *inter alia*, the business of road transportation of goods. The defendant is an agent conducting, among others, the business of import and export of goods.
- [2] The plaintiff is suing the defendant for payment of a total amount of R319 816. 09, allegedly being for direct, necessary and essential costs required to ensure that certain chemical goods are placed in safe storage, to ensure their preservation and protection from elements preserved, and to ensure the protection of the general public from the chemicals, and to specifically prevent damage and theft thereof for the two loads of goods respectively since 17 November 2011 and 18 November 2011.
- [3] The plaintiff called two witnesses, namely Mr Ben Kruger and Mr Babalo Xodwa. Kruger represented the plaintiff in the conclusion of an oral agreement with Refentse Logistics, represented by Mr Babalo Xodwa in terms of which Plaintiff was to carry goods by road transport, including two loads of Sodium Metabisulphate ("the goods") from Gauteng to Mutanda Mine, Katanga Province, Democratic Republic of Congo.
- [4] After both the two aforesaid witnesses testified, the plaintiff closed its case. An application for absolution was brought on behalf of the defendant.
- [5] From the evidence of Kruger and Xodwa the salient facts that emerged are the following:

5.1 During November 2011 an oral agreement was concluded between plaintiff, represented by Kruger and Refenste Logistics represented by Xodwa, in terms of which plaintiff was to carry goods by road transport, including two of two truckloads of Sodium Metabisulphate ("the goods") from Gauteng to Mutanda Mine, Katanga Province, Democratic Republic of Congo.

5.2 The terms of the agreement were, *inter alia*, that:

- i. R54 000. 00 per load would be paid, 50% thereof payable by the day of collection of the goods and the remainder payable on delivery of the goods in DRC.
- ii. a further two days standing time at a rate of R4000. 00 per day per at the border and one day off loading respectively.
- iii. that the plaintiff's truck and trailer will be at Lefarge Lichtenburg on the agreed loading day.

5.3 Xodwa through Refentse Logistics was involved in the transporting industry, as a brokerage. During the conclusion of the oral agreement and during subsequent interactions between the plaintiff and Refentse Logistics, Xodwa never divulged to Kruger who his client was, a fact conceded by Kruger.

5.4 Xodwa too, did not know who the owner of the goods to be transported was, because he sourced the information of the cross border transportation to DRC from another agent, namely Thomas and or Magied Logistics. Where there are multiple agents, none of the agents in the chain reveals who his client is for fear of losing the client to the other agents. Similarly too, Thomas never revealed to Xodwa who the owner of the goods was. If there were payments outside the contract, Xodwa would source money from Thomas and after receipt of payment from the latter, would after taking his commission, pay to the plaintiff.

- 5.5 Kruger conceded that the plaintiff did not contract with the defendant. The plaintiff at all relevant times was invoicing Refentse Logistic. As a matter of fact, the evidence of both Kruger and Xodwa reveals that the relevant documentation, to enable cross border transportation of the freight destined to DRC as well as payment, was to be made by Refentse Logistics. Kruger also conceded that reimbursement was to be made by Refentse, as the party contracted with, and not any other third party. The plaintiff was at all relevant times invoicing Refentse.
- 5.6 The two loads of sodium were picked up by the plaintiff's trucks from Boksburg and brought to the plaintiff's yard, while awaiting payment of the 50% deposit on the agreed amount.
- 5.7 Refentse failed to either effect the deposit or provide the relevant documentation, resulting on a delay of 7 (seven) days for one truck and 8 (eight) days for the other truck from 17 and 18 November respectively.
- 5.8 While waiting for payment and documentation, the trucks waited at Nuco's premises. After it was determined that the freight consisted of sodium, it was decided by the plaintiff to have the trucks moved to Meyerton at Dewaldt and Ettienne Nienaber for safe storage at a cost of R25 800 inclusive VAT per month from November 2011 to March 2012, R34 533 inclusive VAT per month from April to June 2012 thus totalling storage costs in an amount of R267 429.60.

- 5.9 The initial intention of the plaintiff in keeping the consignment was to sell it to recover its loss. Later the consignment was analysed and when it was found that it was sodium, a safe storage was sought as the plaintiff suspected that it is harmful.
- 5.10 Under cross examination Kruger conceded that he could have returned the consignment to where he originally picked it up from, as early as in December 2011, and by so doing avoided storage charges. He, however, wanted to keep the consignment as a bargaining tool to induce payment of what was owed to plaintiff by Refentse. He was, however, unable to refute the proposition put to him that the storage charges referred to herein above were exorbitant. He also conceded that there was no agreement between plaintiff and Refentse or McGee regarding the storage charges.
- 5.11 At a certain point there was a delay in receiving money from Thomas, consequently Xodwa ended up passing the details of Thomas to the plaintiff so that the latter can call for the payment direct from Thomas.
- 5.12 According to Kruger, prior to the sodium freight agreement, the plaintiff had transported three loads of cement (25 tons) from Lichtenburg to Motande Mine in DRC, on contract with Refentse, for the price of R54. 000. 00 per load. The plaintiff was paid at a later stage for the cement an amount of R54 000, paid by Refentse, and R27 000 by McGee.

5.13 Kruger conceded that he was subsequently approached by one Thomas of McGee Logistics, also a transport broker, with arrangements for payment for stock belonging to the defendant to be transported to DRC on urgent basis during January 2012.

5.14 Kruger further conceded that he did not know from whom the payment he received was, but allocated the payment from McGee Logistics to the Refentse cement load outstanding account.

[6] With regard to an absolution application from the instance, the courts have set out the test to be applied. The question to be asked is 'whether there is evidence upon which a court, applying its mind reasonably to such evidence, could or might (not should nor ought to) find for the plaintiff...' *Vide Claude Neon Lights (SCA) Ltd v Daniel* ¹approved by the *Supreme Court of Appeal* in *Gordon Lloyd Page & Associates v Riever and Another* ².

[7] It brooks no argument that the plaintiff bears the *onus* of proving its case. In my view, the concession made by Mr Kruger that the plaintiff contracted with Refentse and not with the defendant is fatal to the plaintiff's case in respect of what was owed to it, coupled with the confusion on its part in crediting what was paid by McGee to Refentse account. In my view, a reasonable court faced with such concessions, will find against the plaintiff in regard to the claim relating to the

¹ 1976 (4) SA 403 (A) at 403G-H.

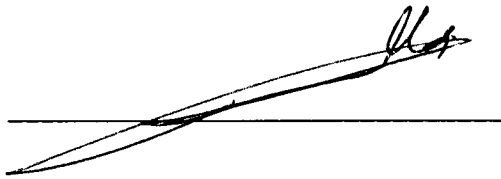
² 2001 SA 88 (SCA) at 92E-93A.

standing charges of 7 and 8 days. An absolution from the instance in respect of this claim should be granted.

- [8] In respect of the claim for storage charges, the concession by Kruger that he could have avoided the storage charges by simply returning the consignment to where he picked it up from, demonstrate, in my view, that the plaintiff is unable to prove that the storage charges were in fact necessary and reasonable and could not be avoided. The fact that he was unable to refute that the storage charges were exorbitant, is in my view, telling against him in discharging the *onus* resting on the plaintiff to show that such costs were reasonable and necessary. Further, there was no expert evidence to show what the consequences of keeping the sodium consignment and under what conditions were, to show that it was reasonable and necessary to keep the goods at the storage, and what adverse effects would have been in not having done so. Further, the fact that plaintiff kept the consignment to exhort payment, when it could have simply issued summons for the monies owed to it, demonstrate in my view that the plaintiff acted *mala fide* and was driven not by necessity but self-aggrandizement. Even if plaintiff is so driven, he would nonetheless have an action against the defendant were he to show that the expenses were necessary and reasonable, which, in my view the plaintiff has failed to prove. There is no evidence that such storage costs were unavoidable. There is also no expert evidence to show that, but for the storage, the consignment would have devalued, or has appreciated in value, as the result of the storage, and that the defendant has consequentially been unduly enriched. In my view, a reasonable court

looking at all these facts, will find that the plaintiff has failed to discharge the *onus* resting on it, to show that these storage costs were necessarily and reasonably incurred, and that the defendant was unduly enriched.

- [9] In the result I am of the view that the application for absolution from the instance was well taken and therefore the absolution from the instances is granted and the plaintiff's action is dismissed with costs.

A handwritten signature in black ink, appearing to read 'N.M. MAVUNDLA', is written over a horizontal line.

N.M.MAVUNDLA

Date of Hearing : 02 / 09 / 2014

Date of Judgment : 20 / 05 / 2015

PLAINTIFF'S ATTORNEYS : VAN GREUNEN & ASSOCIATES

PLAINTIFF'S ADVOCATE : ADV JC KLOPPER

DEFENDANT'S ATTORNEYS: LOUIS GISHEN & ASSOCIATES

DEFENDANT'S ADVOCATE : ADV A C BOTHA