

**IN THE SOUTH GAUTENG HIGH COURT
JOHANNESBURG**



CASE NO: 32318/08

Reportable in:

SAFLII, JDR (Juta) and JOL (LexisNexis) only

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(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES /
NO
(3) REVISED.
DATE: _____ SIGNATURE _____

In the matter between:

**STRUCTURED CONNECTIVITY SOLUTIONS (PTY)
LTD**

Plaintiff

and

**ABSOLUTE AFRICA SUPPLY CHAIN SERVICES
(PTY) LTD**

Defendant

JUDGMENT

WILLIS J:

[1] In this trial action, the Plaintiff claims the sum of R874 101,98 arising from damage to goods which allegedly occurred in transit from one destination to another. The defendant counterclaims R600 162, 31 in terms of an alleged agreement of sale entered into between the parties. This agreement is denied by the plaintiff.

[2] It is common cause that a so-called “joint venture” which counsel for the parties and the various witnesses referred to as “Comdev” secured a lucrative contract to supply prefabricated banking branches to Barclays bank in various countries in Africa: Ghana, Uganda and Tanzania (which included Zanzibar). These prefabricated branches were made up in South Africa and then transported to their countries of destination for assembly at the sites where they were to function as branches. Comdev secured the services of the plaintiff to procure the materials and to arrange for their delivery in a prefabricated condition to their sites of destination. The plaintiff, in turn, entered into a written agreement with the defendant for the defendant to provide logistical, warehousing and transport services to the plaintiff in respect of these prefabricated banking branches.

[3] Although it had originally been intended that the goods would be sent by seafreight to their countries of destination and then transported overland by road in trucks to the actual sites of assembly, pressure of time resulted in the goods being airfreighted to the countries of destination, then warehoused and thereafter transported

overland in trucks to the actual sites. Part of the prefabrication included decals made of hard plastic in “Barclays blue” which contained the logo of the bank. As part of the prefabrication the decals had been attached to certain of the panels made up in South Africa before their despatch to their countries of destination. In all the countries concerned various of these decals had become damaged or scratched to an extent that would be unacceptable to Barclays and had to be replaced. The damage occurred in July 2007. It is the replacement of these damaged decals that has given rise to the plaintiff's claim.

[4] It is common cause that the goods were insured by the defendant for their journey up until their airfreight journey had been completed. They were not insured for their overland journey on road in trucks from the warehousing in their countries of destination to the actual sites of assembly. Part of the dispute between the parties had initially been whether the agreement between the parties provided for their insurance for this part of the journey as well. The defendant contended that there was no such agreement and that, in any event, it would not have been possible to obtain such insurance. The plaintiff, on the other hand, contended that insurance right up to delivery on site of assembly formed part of the agreement between the parties. Although quite a lot of time was taken up in the trial on this issue, it ultimately became irrelevant. The reasons for this are the following:

- (i) The defendant had to concede that the risk in respect of damage in transportation remained with the defendant until the goods had been delivered to the plaintiff at site;
- (ii) the evidence established, on a balance of probabilities, that the goods had indeed been expertly packaged, loaded, strapped and transported for the airfreight portion of their journey and indeed that they had been in an undamaged condition right up to the stage of their warehousing near the airports in their country of destination.

The case therefore turns on a narrow issue: were the goods damaged while being transported on trucks from these warehouses to the sites of assembly or were they damaged on these sites after delivery had taken place?

[5] Mr Gareth Botha, a director of the plaintiff, testified that the site managers at the various sites had reported to him that, upon unpacking the goods after delivery, the damage had been uncovered. The damage could not have been detected before unpacking out of the packaging and, in any event, almost all the signatures on the delivery notes were of persons who were not employees of the plaintiff or duly authorized to sign on its behalf. Mr Johan Herbst, the plaintiff's on-site project manager in Tanzania testified that the damage had to have occurred during transportation as much of the damage (which was similar in every instance that he saw) was apparent at the time when the goods were being unpacked. He specifically and firmly denied that the goods could have been damaged in the way that they were, on site. Mr Herbst went further: it was clear that damage was caused by friction or the rubbing of the various panels against each other. Mr Ernest Seagreen the Plaintiff's on-site project manager at three of the sites in Tanzania gave evidence which was substantially the same as Mr Herbst. Mr Seagreen described the damage as "skaafmerke" which he emphatically disavowed could have been caused on site. He said that Mr Johan Voges, the project manager at the other four sites in Uganda and who was not available to testify had reported to him the same problem. The plaintiff's witnesses all gave evidence of high quality. It is common cause that the panels in question were protected in the packaging by a 2mm thick synthetic insulation known as "aerotherne". Although there was a difference of opinion as to the quality of the roads in question, it was clear that long distance haulage was involved in almost every instance and that the roads could not be described as being "as smooth as a baby's bottom".

[6] Apart from Mr Derek Westernne, the managing director of and majority shareholder in the defendant, the defendant's witnesses, Mr Johan Herselmann, Mr Anton Groenewald and Mr Alain Da Costa all gave evidence as to the high standard of the packaging of the goods which were being transported. None of them gave evidence of a direct nature as to what caused the damage. Mr Da Costa conceded that he could not exclude the possibility that the goods had been damaged when they were transported on the trucks. It should also be borne in mind that, although the goods were stacked on to strapped palettes for their air freight, they were unstacked from these palettes for sorting before they were transported on trucks. Mr Westernne gave evidence as to what had been agreed between the parties.

[7] Various criticisms can be levelled at the evidence of Mr Westernne:

- (i) aspects of his version which should have been put to the plaintiff's witnesses were not – for example (a) that Mr Botha had specifically been told by him that there would be no insurance for the transportation by road in the countries of destination and (b) that a “fabricated” or at very least misleading insurance claim had been submitted with the knowing co-operation of Mr Botha;
- (ii) His description of the manner in which the goods had been packed differed from that of his own witness, Mr Da Costa;
- (iii) He was prepared to mislead the insurers as to the possibility that the goods could have been damaged during their being airfreighted;
- (iv) The documentation upon which he relied in support of the counterclaim appears to have been contrived, containing detail that matches in a fine degree and to an extent that cannot be mere coincidence with that upon which the plaintiff has relied for its claim;

- (v) He not infrequently contradicted himself and when confronted therewith said that he had “made a mistake”;
- (vi) He eventually conceded that there had been no agreement between himself and Mr Botha in regard to the subject matter of the counterclaim but reasoned that the plaintiff was liable as the defendant was not responsible for the value of the goods which the defendant had replaced.

Accordingly, the defendant’s counterclaim cannot succeed. It must be dismissed.

[8] Insofar as the plaintiff’s claim is concerned, the defendant relied, essentially, upon the plaintiff’s *onus* to prove that, as matter of probability, the goods had been damaged while they had been transported on road in their countries of destination and not after they had been delivered to their sites of ultimate destination. In other words, other than to shrug his shoulders, hold up his hands in resignation and suggest that the damage could have been caused by “anything”, Mr *Wannenburg*, who appeared for the defendant, could not indicate what could account for the damage. It seems to me that, as a matter of probability, the goods in question were indeed damaged while they were being transported overland by trucks in their countries of destination (i.e. before they had been delivered to the assembly sites). I come to this conclusion for the following reasons:

- (i) exactly the same type of damage occurred to the same goods at different sites and in different countries – suggesting that there must have been a common denominator;
- (ii) the common denominator is the 2mm thick aerothene between the panels during transportation – one hardly needs to be an expert to deduce that this would have been inadequate to safeguard against the friction that would inevitably accompany

the transportation of goods in trucks over long distances on less than perfect roads;

(iii) clear and convincing evidence was given that the damage to the decals was indeed caused by friction;

(iv) much of the expert packing, stacking and strapping for the airfreight would have had to have been undone when the airfreight journey had been completed;

(v) no other explanation for why the damage should have been of the nature it was suggests itself.

[9] It is common cause that the cost of replacing the decals was an amount of R874 101.98 and that, pending the resolution of the dispute, Comdev had paid an amount of R672 144.14 to Sign Out CC on behalf of the plaintiff in order to ensure that the damaged goods were replaced timeously. Comdev has yet to pay an amount of R201 957.84. Mr *Wannenburg* submitted, in one breath, that the plaintiff had, accordingly suffered no loss, and in the next breath that, alternatively, the plaintiff's proven damages stood at R201 957.84 less than that which had been claimed. In my view, the payment by Comdev was clearly *res inter alios acta*: the contract in question was between the plaintiff and the defendant, the plaintiff suffered its loss when the breach occurred and is entitled to be recompensed by the defendant - the payment by Comdev is a collateral matter. (See *Santam Versekeringsmaatskappy Bpk v Byleveldt* 1973 (2) SA 146 (A) at 150F; 153B-D and 168 and *AA Alloy Foundry (Pty) Ltd v Titaco Projects (Pty) Ltd* 2000 (1) SA 639 (SCA) at paragraph [11].) The plaintiff's quantum of damages has been proven in the amount it has claimed. It seems from the uncontested allegations in the pleadings that the date from which *mora* interest can safely be determined to run is 26th July, 2007.

[10] Finally, there is an issue which has been raised by Mr *Wannenburg* in his heads: the plaintiff had failed to comply with

certain conditions in the defendant's general terms and conditions to which reference was made in Annexure "A" of the agreement between the parties in regard to timeous reporting of the loss. These terms and conditions were, according to the defendant, available on request. Quite apart from any other considerations, I agree with Mr *Du Plessis* who appeared for the plaintiff that as this aspect had never even been pleaded by the defendant, it cannot even be considered now.

[11] Judgment is given for the plaintiff against the defendant as follows.

A. The defendant is to pay the plaintiff:

(a) R874 101,98;

(b) Interest on the aforesaid sum at the rate of 15,5% *per annum* from 26th July, 2007 to date of payment;

(c) Costs of suit.

B. The defendant's counterclaim is dismissed with costs.

**DATED AT JOHANNESBURG THIS 5th DAY of
FEBRUARY, 2010.**

N.P. WILLIS

JUDGE OF THE HIGH COURT

Counsel for the Plaintiff: Advocate *D.T. v R. Du Plessis*

Attorneys for the Plaintiff: Le Roux Vivier & Associates.

For the Defendant: Advocate *W. Wannenburg*

Attorneys for Defendant: Sim & Botsi Attorneys Inc.

Dates of hearing: 14th -18th September, 2009 and 26th January, 2010.

Date of judgment: 5th February, 2010.