

IN THE KWAZULU-NATAL HIGH COURT, PIETERMARITZBURG
REPUBLIC OF SOUTH AFRICA

APPEAL CASE NO: AR110/13
DURBAN CASE NO : 9427/2011

In the matter between:

LEIGH-ANN OOSTHUIS

Appellant
(Defendant in the Court a quo)

and

FAMOUS PACIFIC SHIPPING CC

Respondent
(Plaintiff in the Court a quo)

JUDGMENT

Delivered on: 4 October 2013

NTSHANGASE J

Introduction

[1] This is an appeal against the following judgment of the Magistrate's Court Durban :

'Judgment is granted against the defendant as follows :

1. Payment of the sum of R20 070;
2. Interest thereon at the rate of 15.5% per annum from 23 March 2011 to date of payment;
3. Costs of suit.'

[2] For convenience in what follows the appellant and respondent will be referred to as defendant and plaintiff respectively as they were in the trial court.

[3] By reason of the peculiar pagination of the record in this case where papers bear two numbers, both numbers on the papers will be quoted in this judgment when reference to specific pages is made. The typed record of proceedings refers to one of the two numbers as a page number. The Magistrate's judgment refers to such numbers as exhibit numbers.

[4] The plaintiff's case as pleaded in the trial court is that the defendant negligently, alternatively intentionally removed from a rail list and diverted three containers for merchant

road haulage contrary to the plaintiff's client's instruction in consequence whereof the plaintiff suffered damages in an increased amount of R20 070 as cost for storage pending onward transportation of such containers by merchant road haulage and 'the change of the manner of transportation.'

[5] The defendant, while admitting that she removed from the rail list and diverted such three containers for merchant road haulage, denied liability and put the plaintiff to the proof of its allegations. The presiding Magistrate found her to be liable.

[6] It is common cause that the business of the plaintiff included the facilitation of conveyance of cargo from Durban to its ultimate destination. It is also common cause that the defendant was an employee of the plaintiff at the time of her impugned conduct. She resigned on 23 August 2010 as reflects at page 50/55.

[7] On the issue in contention Ms Renelle Sharon Mariah [Renelle], an import supervisor under whom the defendant worked testified that she was responsible for ensuring that all imports received by the plaintiff were handled according to the clients' instructions and, relevant to this matter, with regard their conveyance to their ultimate destinations.

Jacqueline Etschmaier (Jacqueline) was the managing member of the plaintiff.

A summary of the versions of the parties

[8] I deal with the handling of the matter of the containers in question as per Renelle and with the defendant's response thereto.

At page 39/44 is an e-mail from the plaintiff's client Customs Services (Pty) Ltd with the date and time 23 August 2010 : 11.10 AM with instructions -

'Containers to move via rail to Johannesburg.'

It reflects container numbers CAIU 2595466, KKTU 7931923 and KKTU 7657453.

It is the numbers of the containers which are the subject of the present matter.

It is addressed to Renelle.

[9] Renelle stated that once the e-mail was received she 'printed it out and (she) handed the e-mail to Leigh-Ann,' the defendant who was in possession of the file. Renelle told the court that as she handed over the e-mail to the defendant she said to the defendant -

"Please action it accordingly" and she said okay and she took it from me and she went on with her job.'

[10] At page 45/50 is an 'SOB and Redirection form' which "K-Line" sent to the plaintiff. Once completed the defendant was to e-mail it back to the line. It was completed by the defendant in long hand. It bears a tick mark in the block against which a line reads -

: (i.e. take container off the rail list, use your own transport)'

This is in answer to the question on the same line... : 'Do you then require merchant haulage.'

The SOB and Redirection form reflects the same container numbers as reflected at page 39/44 which is the e-mail bearing the client's instructions that the containers were to be moved via rail to Johannesburg.

The contact person on the SOB and Redirection form is reflected as 'Leigh Ann'.

[11] At page 42/47 is an e-mail with date and time 23 August 2010 : 12.50 PM from the defendant which reads -

'Attached please find indemnity for removal of the above containers off the rail list for merchant road haulage.'

It bears the numbers of the three containers, which are subject of this matter. The three container numbers reflect on the document at pages 43/48 and 44/49 which, according to Renelle, were attached to the document at page 42/47. Page 44/49 bears the name 'Leigh - Ann' and next to the client's name stamp, is what Renelle presumably referred to as being the signature of the defendant. It is the defendant's initial.

[12] In a summary of events which is at pages 37/42 and 38/43 prepared by Renelle, which she confirmed in her testimony, she pointed to the fact that she had looked at the file and seen that the instruction that had been addressed to her and handed over to the defendant on 23 August 2010 was not in what she referred to as the 'master sub-file' where it should have

been with defendant's correspondence to "K -Line". It was in what she referred to as the 'LCL sub-file.'

[13] She testified that she had telephoned the defendant and explained to her what had happened. She told her that there was no instruction to remove the containers off the rail list to which, the defendant, in response, stated that there were in fact three containers to be removed off the rail list. She informed the defendant that there were no e-mails with such instructions. She invited the defendant to come to the office to view the files. The defendant promised that she would, in the company of her mother. When her mother subsequently telephoned Renelle to enquire as to what had happened, Renelle explained to her what had happened and invited her to join the defendant to the office to view the files. The defendant's mother declined the invitation and said the defendant was being 'framed', whereupon Renelle invited them 'to bring in (their) own specialist to view all (their) pc's, servers, material, whatever (they) had on hand'. She testified that both failed to take up the invitation.

[14] Cross-examined on the significance to be attached to 'Remove off rail list' and 'Remove off rail' engraved on documents 1 and 2 at pages 29 and 30 respectively Renelle's explanation was as follows :

'No, although it's written "remove off rail list," it is pre-written, pre-prepared. It's only when an instruction is handed over from the client do you act on instruction. So even though it's written there, it doesn't mean it had to be removed off the rail list.'

She said this applied to the case of the specific client Customs Services and, the defendant not being a trainee but a controller, 'would have known that the client would remove or wouldn't remove off the rail list and that files are pre-prepared,' and also 'because she trained to know it.'

[15] It was further put to Renelle as defendant's instructions that when she was given the two files the tops whereof were engraved with instructions to remove off the rail list, she had not dealt with 'Shanghai' before. This, Renelle disputed.

[16] Renelle was referred to the client's instructions at pages 39/44 and 41/46 :

'If this e-mail is not for you, please kindly pass on to the correct person and cc me in.'

Renelle conceded that the client had specifically required her to 'cc (it) in' and she did not do it.

As to why she did not comply with the client's instruction what purports to be her explanation is lost to 'inaudibles' in the transcript of her following recorded response :

'When it comes to e-mails, the reason why I didn't forward it on to Leigh-Ann because I'm ... [inaudible] I'm directly ... [Inaudible] another copy to myself.'

[17] Renelle insisted that the defendant received the relevant files before 23 August 2010 and that she received the e-mails on 23 August 2010; if she had not, she would not have sent an e-mail to "K-Line" on 23 August 2010.

[18] Jacqueline explained the procedure followed in handling shipment matters; in particular she explained the pre-capturing or pre-preparation process as being necessitated by need to cope with high volumes of work which was to be executed within time constraints. What was pre-captured on files was drawn from the bill of lading. "Remove off the rail list" would be pre-engraved at the beginning of the process in respect of the client in this matter as the client's instructions were in 90% of the cases for removal off the rail list as 'the norm.' This was confirmed by Renelle in her testimony. She had pre-captured the files in question. The data was pre-captured ahead of time and when the arrival notification is received from the shipping line, the person responsible takes over and has to fully activate the file and adjust in terms of the client's requirements which differ from shipment to shipment. She explained that in the pre-capture procedure they 'go on what the previous history shows. When the arrival notification comes in or they change their minds and send an instruction, you then have to amend your files there and then.'

Jacqueline further explained that if the instruction is to leave it on the rail list what is done is either to 'tipp-ex' "remove off rail list" or to complete a new file and recapture all the information.

[19] As did Renelle, Jacqueline disputed that the defendant was not aware of the standing procedural instructions which pertained to the pre-preparation of files. Jacqueline testified that '(her) staff are trained A to Z; they have to have the ability to take on the work of any staff member... in the imports department.' She as did Renelle, disputed that the defendant had not, before, handled Shanghai. She stated that she had personally assigned Shanghai to the defendant as her trade lane and that she had handled that trade lane for about two months until the point of her departure; and, that is why the 'indemnities' were in the defendant's handwriting on the shipments from Shanghai which are in question in this matter. She stated

that the same rules and principles applied whether the shipments were from Taiwan, Shanghai or India as to how the files were handled.

[20] The defendant insisted in her denial that she was handling Shanghai. She stated that the Shanghai file was handed to her on 23 August 2010.

[21] In regard to the removal of the containers off the rail list she stated that she acted on instructions from Renelle. In regard to the inscription "remove off the rail list" on the file cover, she said she was not aware that the client in question in this matter predominantly, to the extent of 90%, moved its containers off the rail list for cartage to Johannesburg and that by reason thereof the client's files were, in pre-preparation, endorsed "remove off the rail list."

[22] She stated that although she resigned on 23 August 2010 she had continued to work within the period of her notice. On 15 September 2010 she had reported late for work because of a personal problem which she failed to disclose, in consequence whereof she was dismissed from employment the following day, the 16th September 2010, she received a call from Renelle who told her that there was a mistake on the file she had handled. It is the file in question in this matter. She did state that she was invited to come and view the documents. She had undertaken to discuss the matter with her mother and indicated that they would call at work to view the documents.

The evaluation of the evidence before the trial court

[23] This case turns on the alleged failure of the defendant to act in terms of the plaintiff's client's e-mail at page 39/44 dated 23 August 2010 which required the containers to be moved to Johannesburg by rail cartage and which Renelle stated she gave to her on the same date. Pitted against Renelle's testimony is the defendant's insistence that she was not given the e-mails. In her testimony she stated that Renelle had written on the top of the file in bold black to 'remove off the rail list.' She stated -

'I was told by Renelle verbally to remove the two files' containers off the rail list.'

She also stated -

'I took her instructions because she is my superior and I should listen to what she used to instruct me to do.'

But when questioned -

‘So then you did not actually open the file and look in it?’

Her response which shows that she did not in fact act on oral instructions from Renelle was -

‘I did look in the file.’

[24] The probability of the defendant’s version is assailed by the failure to challenge Renelle’s testimony to the effect that when the defendant returned her call, upon being given a detailed explanation of what had happened, she (the defendant) had -

‘insisted that there was an e-mail to remove these three containers off the rail list’

She also said :

‘No, there is and its in the file.’

Renelle said this was the defendant’s response when she (Renelle) said there was no instruction in the file for the removal of the containers off the rail list.

What also tends to belie her version is that when it was put to her that the trigger was an instruction from the client, but that she did not look for that she in response stated -

‘I did look for that in the file but that was not inside the file at the time I was there.’

If she had acted on the instructions of her superior Renelle, and in terms of the inscription on the file cover, she would have had no reason to look for the instruction inside the file. The defendant proffered no satisfactory explanation as to why she still found need to look for an instruction inside the file.

[25] The fact that the defendant looked in the file for the client’s instruction despite the fact that the file cover was endorsed ‘remove off the rail list’ appears to be an unequivocal acknowledgment and concession that what prevails is the client’s instruction as the trigger for the action to be taken with regard to the cartage of the containers. This defeats her stated ostensible reliance on the file cover instruction and the alleged oral instruction from her superior, Renelle.

[26] The defendant fell short of disputing that the files are pre-prepared and that the data is pre-captured ahead of time pending notification from the shipping line and that adjustments are made to meet the requirements of the client as to how the cargo was to be transported.

The defendant put her response no higher than that she had no knowledge that for the particular client 90% of their instruction was to remove off the rail list and also that she was not aware of the pre-existing procedure applied in respect of the plaintiff's VIP client concerned.

[27] Some telling concessions eroded the probability of the version of the defendant in her answers under cross-examination as reflects hereunder:

'You have dealt with these kind of files for quite a while. I am correct that the trigger for when things really start happening is when you receive something from a client, is that correct? ... Yes'

Note also the defendant's answer in what follows -

'And you know that, well it was not challenged that you had until roughly 1 September on the three containers to send out the remove off rail request? Renelle gave that evidence ... Yes, that is correct, 72 hours prior ...'

Renelle had, in that regard stated -

'(T)he shipping lines' rule is that all removal off the rail list has to be submitted 72 hours before the vessels' ETA. [i.e. expected time of arrival]'

The defendant was questioned -

'So why action it on the 23rd ?'

Her answer was wholly unacceptable. What she said would violate the shipping lines' rule. She said -

'Because sometimes you get busy and you forget to do certain things, so you ... [inaudible] as soon as you get an instruction you send it out.'

The expected time of arrival of the vessel with the three containers was 5 September 2010. The rule is that all removals off the rail have to be submitted 72 hours before the expected time of arrival of the vessel.

[28] The presiding Magistrate's observation that 'the timing of the e-mail ties in with the time that the defendant says she received the file and carried out the action,' is, in my view, fully justified. Renelle received the first instruction at page 39/44 for containers to move via rail to Johannesburg as sent to her on 23 August 2010 at 11:10 AM. It pertains to the three containers in question. She received the second instruction at page 41/46 from the same client which was for removal of a container off the rail list as sent to her on 23 August 2010 at 11:31

AM. Her undisputed evidence was that once the e-mail was received she printed it. The defendant significantly sent the first received instruction (wrongly) on the same date - on 23 August 2010 at 12:50 PM and the second received instruction (correctly) also on the same date - on 23 August 2010 at 12:58 PM.

[29] The trial court was, in my view, correct in rejecting the version of the defendant that she had not handled the Shanghai lane. In my view she was untruthful on this aspect. The defendant was a poor witness. She initially admitted that she had signed a 'release letter' at page 36/41 on 18 August 2010. When she was confronted with this as disproving that she had not handled Shanghai before 23 August 2010, she somersaulted as follows :

'I was thinking now. If I only invoiced on 2 September, the release letters are printed on after we have invoiced the file. So I could not have signed for this on 18 August.'

She contradicted herself in her evidence also on the aspect surrounding instructions allegedly from Renelle with regard to the removal of the containers off the rail list. When she was asked -

'Now, did you do anything more than that or did you just accept those instructions?'

Her response earlier quoted was -

'I did not look for that in the file but that was not inside the file at the time I was there.'

So, she did after all do something more than her professed compliance with Renelle's instruction. Not only does it beg the question as to why she needed to look for the client's instruction on the file if hers was simply to comply with instructions allegedly given by her superior Renelle, it also establishes her knowledge of the client's instruction as the sole trigger for the action to be taken with regard to the cartage of containers, whether it be via rail or off rail.

[30] It is noteworthy that the defendant spurned the invitation by Renelle on 16 September 2010 to view the documents concerned to satisfy herself with regard to the handling of the matter of the containers in question. This is inconsistent with innocence. One would have expected her to seize the opportunity to prove Renelle wrong. She instead sought refuge, as she was of course entitled to do, in legal representation.

[31] She also spurned an offer to pay R4000 only. An endeavour to fully canvas this under cross-examination was stifled by her legal representative's intervention. When Mr Boulle for

the plaintiff enquired from the defendant whether she recalled that her attorney had put to one of the witnesses in cross-examination that she had declined on principle to accept the offer to pay R4000 only, Mr Pearton, for the defendant intervening stated-

‘Sorry I don’t recall it.’

He suggested that Mr Boulle might be mistaking a discussion outside court. In the face of this persistence Mr Boulle, who insisted that he specifically recalled it, felt compelled not to pursue his cross-examination. He was correct. As reflects at page 190 of the record Mr Pearton had, in fact, in cross-examination of the plaintiff’s witness Renelle state-

‘So my instructions are and once again, and this is the reason why she has refused to pay all the time right from inception; she could have got away with four grand; she could have paid R4000 but on principle she said “I am not. Its not my mistake. It was Renelle’s mistake ...”

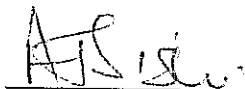
I find, as did the presiding Magistrate, that it was her mistake. It was a mistake born of negligence.

I pause here to state that unwarranted and sometimes unduly protective interventions during cross-examination tend to defeat the purpose of cross-examination and may quite often render it ineffective.

[32] In all the circumstances I am of the view that the presiding Magistrate, who gave cogent reasons for his decision on this matter, was not wrong. This precludes interference by this court. The appeal cannot succeed.

The order

The appeal is dismissed with costs.



SISHI J

I agree

Appearances:

For the Appellant:	M Bingham
Instructed by:	Thorpe and Hands Inc. c/o Austen Smith

For the Respondent:	A J Boule
Instructed by:	Norton Rose 3 Pencarrow Crescent La Lucia Ridge Durban