

/LVS
**IN THE HIGH COURT OF SOUTH AFRICA
(NORTH GAUTENG HIGH COURT, PRETORIA)**

NOT REPORTABLE

DATE: 15/4/ 2009
CASE NO: 10777/2004

In the matter between:

COMBINED DISTRIBUTION SOLUTIONS CC PLAINTIFF

Vs

**THE COURIER FREIGHT GROUP (PTY) LTD DEFENDANT
t/a XPS**

JUDGMENT

BOTHA, J

The plaintiff is Combined Distribution Solutions CC. The defendant is Courier Freight Group (Pty) Ltd, trading as XPS.

The plaintiff claims damages for breach of contract in an amount of R696 428.00.

The defendant has a counterclaim for services rendered in an amount of R281 094.96.

The plaintiff relies on an oral contract allegedly concluded on 11 February 2004. It is alleged that the plaintiff was represented by Ms Althea Oosthuysen and the defendant by Mr Victor Hendricks and Ms Dawn Venter.

The terms of the agreement are alleged to be the following:

- (a) the plaintiff, a broker for the supply of courier services, intended to contract the courier services of one of its clients, Elster Kent Metering (Pty) Ltd (Kent) out to the defendant on condition that the defendant assist the plaintiff in the establishment of a so-called full in-house system;
- (b) Kent was prepared to supply a computer, a modem and Telkom land line needed for the operation of the full in-house system;
- (c) The defendant would supply the computer software and printer for the full in-house system after the computer, modem and Telkom land line had been installed;
- (d) In view of the fact that the defendant required a minimum turnover of R50 000.00 per month before supplying a full in-house system, Kent confirmed that as soon as the full in-house system had been installed, it would place 100% of its courier work with the plaintiff;
- (e) The printer to be made available by the defendant had to be delivered on or before 20 February 2004;
- (f) After the defendant had installed the computer software and printer, the plaintiff would have been able to handle 100% of Kent's courier needs.

It is alleged that the plaintiff was able to fulfil its obligations in terms of the agreement.

It is alleged that it was crucial that the computer software and printer had to be made available on or before 20 February 2004 for the installation of the full in-house system.

It is alleged that the plaintiff proceeded to make arrangements with Kent for the supply of the computer, modem and Telkom land line.

It is alleged that the defendant repudiated the agreement by failing to make the computer, software and printer available on or before 20 February 2004, thereby having the effect that the plaintiff could not install the full in-house system.

It is alleged that the plaintiff accepted the defendant's repudiation of the agreement.

It is alleged that it was, at the time of the conclusion of the agreement, in the contemplation of the parties that the plaintiff would suffer damage if it could not fulfil Kent's courier needs.

It is alleged that at the time of the conclusion of the agreement, the plaintiff concluded an agreement with Kent in terms of which Kent would, as soon as the full in-house system had been installed, place 100% of its courier services with the plaintiff.

It is alleged that from March 2004 to October 2005 Kent's courier services amounted to R2 437 511.00. On that the plaintiff would have made a gross profit of R696 428.00 taking into account a purchase price of R1 741 107.00 and a 40% profit margin.

The defendant admitted a meeting on 11 February 2004 but denied that any oral agreement was concluded as alleged or at all. It is alleged that at the meeting the parties discussed the installation of the full in-house system at Kent.

It is alleged that the parties knew and that Ms Oosthuysen ought to have known, that a written application had to be made to the defendant for the installation of the full in-house system at Kent. It is alleged that the Plaintiff lodged such an application on 17 February 2004 and that it was rejected on 17 February 2004 by the defendant, as represented by Mr V Hendricks.

The counterclaim is based on an alleged agreement concluded on 14 January 2003 in terms of which the defendant would purchase and deliver parcels on behalf of the plaintiff to the plaintiff's clients.

It is alleged that the defendant would grant the plaintiff credit, that interest would be charged on outstanding amounts at the maximum legal rate, and that payments would be made within 30 days of the date of statements.

It is alleged that the plaintiff is indebted to the defendant in an amount of R281 094.96 in respect of services rendered between January 2003 and February 2004.

The plaintiff's plea to the counterclaim in essence amounted to a denial. The defendant was put to the proof of its counterclaim. During the trial, whilst Ms Oosthuysen was still giving evidence, the parties asked me to make an order in terms of Rule 33(4) to the effect that the issue of liability in respect of the plaintiff's claim be adjudicated first and separately. I made such an order and postponed the other issues sine die.

Mrs Althea Oosthuysen testified that she was the only member of the plaintiff. The plaintiff was incorporated in 2003. Previously its name was B.O Distribution.

The plaintiff was a broker in the courier industry. The plaintiff used service providers that disposed of logistical networks. She would negotiate tariffs with a service provider, add a mark-up and then approach a client. She would then conclude a contract with a client, normally an oral contract.

When the plaintiff had a parcel to deliver the driver of the service provider would present a waybill on which the address of the client and the delivery address had to be entered. The driver would take the parcel and leave a copy of the waybill. The parcel would then be taken to a central hub where it would be sorted according to its destination. Upon delivery the particulars of the

recipient and the time and date of delivery had to be entered on the waybill.

At the end of the month the service provider would send the plaintiff an invoice together with a freight management report (FMR) indicating the movement of each parcel and a hard copy of the proof of delivery (POD) which is a signed copy of the waybill.

The plaintiff then had to make payment, if it was satisfied with the correctness of the invoice, within 30 days.

She referred to Elster Kent Metering (Kent). Kent manufactured water meters and relied on courier services for the distribution of its product. Kent had an in-house system for the consignment of parcels on a daily basis. She was referred to Mr Johan Bezuidenhout of Kent with a view of taking over Kent's courier work that at the time was being done by RTT. By handling smaller parcels she could offer a more competitive service.

Kent allowed the plaintiff to be on the premises and she posted one Sipho Bongane to Kent's premises to handle smaller parcels.

She intended to use the defendant, XPS, as the plaintiff's service provider. She had been a sales representative at XPS for two years.

In order to get Kent's courier business a full in-house system had to be installed on Kent's premises. That entailed a computer,

a modem, a Telkom land line, a printer and computer software. The software consisted in a programme to process the information relating to the addresses of provenance and destination. The printer was a specialized Litho printer that printed stickers with bar codes.

The bar codes on the stickers are scanned at the hub and further on the information is fed into a data system. In that way it was possible to trace the whereabouts of a given parcel at any time.

She approached XPS to handle Kent's work because XPS was one of the biggest operators in the country.

She discussed tariffs with XPS, then added her mark-up and eventually submitted her tariffs to Kent. Her tariffs were competitive and Kent accepted them. All the plaintiff had to do was to install a full in-house system at Kent.

She referred to an e-mail dated 9 February 2004 from XPS's sales manager, Ms Dawn Venter, (A2). In the letter Mrs Venter referred to a report from XPS's operational manager, Mr Desmond Permal about a meeting at Kent (Elster). Mr Permal was of the view that the in-house system had to be installed as quickly as possible. Ms Venter asked for Kent's details so that XPS's IT department could prepare the software.

At that stage Kent had not yet cancelled its contract with RTT.

On 11 February 2004 she had a meeting at XPS's headquarters with Mr Victor Hendricks, XPS's managing director and Ms Dawn Venter. They discussed the requirements for the installation of a full in-house system at Kent. Mr Hendricks told her that XPS would supply a printer, new or second hand.

On 11 February 2004 at 9h57 pm she sent an e-mail to Dawn Venter asking for a date during the next week for the implementation of the full in-house system. See A3.

The agreement was that XPS had to provide the software and the printer. Kent was prepared to provide the computer, the modem and the land line.

XPS insisted on an turnover of R50 000.00 per month.

Kent undertook to give the plaintiff 100% of its business if a full in-house system was installed.

The deadline for the installation of the in-house system was 20 February 2004. If that was done, the contract with RTT would be cancelled.

Kent provided a land line and a computer and modem.

On 12 February 2004 at 7h53 am Mr Ben Burger of XPS sent an e-mail to Mr Permal to the effect that Mr Permal could go ahead. The customer would supply the hard and software. The software referred to Kent's Windows programme.

On 11 February at 4h39 pm Mr Permal sent her an e-mail (A4) in which he stated that the client would indicate by Friday (13 February 2004) whether it wanted XPS's PX containers.

On Friday 13 February 2004 at 3h51 pm Dawn Venter sent her an e-mail (A7) in which she said that it would take seven days to install the full in-house system. She asked details of the client. She asked for a meeting at 13h00 on the Monday.

On the same day she replied indicating that a meeting at 13h00 would suit her. See A8.

On Sunday 15 February 2004 at 8h48 pm she sent an e-mail to Dawn Venter asking her when she could say that XPS would arrive for the installation of the in-house system at Kent. See A9.

On Monday 16 February 2004 at 8h46 am Dawn Venter replied that they had to get together so that she could sign a form for the in-house installation. See A12. This document was not a contract document. She had to supply information about the client's requirements.

There was a meeting on Monday 16 February 2004. She completed an application form for a full in-house system. She signed the document and Dawn Venter signed it. She never saw it again. At that stage there was no indication that XPS was not willing to install the in-house system.

On 18 February 2004 she received an e-mail from Dawn Venter sent at 12h40 in which she was told that XPS could not find a Zebra printer. A new one would cost R20 000.00 and XPS was not sure that the volumes would justify the cost of a new printer. She apologised for having to cancel a meeting to be held.

She was prepared to negotiate about a printer but at that time XPS also put her account on hold. She had problems with her account with XPS. She did not receive all the credits to which she was entitled. Then she was sent accounts that referred to invoices that she had not yet received. She had to pay XPS within 30 days which was before it was possible to invoice her own clients.

On 18 February 2004 she queried her account, but she received no response from XPS.

On 9 February 2004 Mr Sotyato of XPS sent her a reminder in respect of alleged arrears. See A1. She completed a reconciliation of her account (see A20) in terms of which she owed an amount of R90 524.22. She did not include credits to which she claimed to be entitled. She only included invoices in respect of which she had had the opportunity to invoice her client.

She answered Mr Sotyato on 15 February 2004. See A10.

XPS had already installed the software at Kent. Only the printer was outstanding. She dealt with the complaints set out in her letter of 15 February 2004 to Mr Sotyato. Invoices were a

month late so that she could not invoice her clients. In respect of the client Pall SA there were days that were not billed. She did not get all her credit notes. She did not receive the documents needed to verify XPS's statements: FMR's and POD's. She indicated that she was prepared to submit to an audit.

On 18 February 2004 Mr Sotyato sent her a letter complaining about the plaintiff exceeding its credit limit. She regarded that as normal when a business was growing. See A17.

On 19 February 2004 she answered Mr Sotyato denying that he had sent her all outstanding invoices. See A19.

Mr Sotyato did not answer her. He only put her account on hold.

She tried to save her clients by using another service provider, Courier-It.

On 20 February 2004 her then attorney, Mr Hefferman, sent a letter to the defendant in which he stated that the amount of R90 524.22 had been paid into his trust account. He asked that the account be rein-instated and that the documents requested be supplied.

On 23 February 2004 Mr Sotato replied in a letter in which he demanded payment of R200 000.00 in two tranches before the suspension of the account be lifted. See A24. That amount exceeded the amount of R177 736.55 as stated in A1.

On 25 February 2004 Mr Hefferman sent a letter to Mr Sotyato. See A26. In paragraph 1.3 the point was made that the plaintiff could not invoice its clients without proper information of the defendant's accounts.

She referred to a series of letters sent to Kent and other clients sent on 26 February 2004 to dispel rumours that the plaintiff was experiencing financial problems. See A36, 37, 39, 42, 45, 48 and 51.

At the moment Kent was the plaintiff's biggest client. She got the business of Kent in November 2005. She established the turnover of Kent as set out in paragraph 11 of the particulars of claim by accessing RTT's network with Kent's customer code. She explained how the plaintiff's gross loss of profit was calculated.

A88-333 was compiled from the information drawn from RTT's network. For each month there were sheets showing buy rates and sell rates. On A122 the first item, the rate of R40.00 represents what XPS would have invoiced. On A108, the first item, the rate of R56.00 represents the amount of R40.00 plus the plaintiff's mark-up of 40%.

She testified that she had to accept the plaintiff's repudiation.

She never saw B24, a document dated 17 February 2004, in which the reasons for the rejection of the plaintiff's application are

stated. She did not send the document to the defendants head office.

With reference to the alleged reasons she testified that she gave Mr Hendricks and Ms Venter a projected income of close to R100 000.00 per month.

She admitted that her handwriting appeared on B 25 and B26, two pages of a new in-house application form. The completion of the form was an administrative procedure. She wrote "ASAP (23 February)". She filled in the particulars of Sipho Bongane and she ticked off the services required. She never received a copy of this document.

The defendant did indeed install the software at Kent. She agreed in cross examination that B46-50 was an example of a contract between XPS and a client. A contract would be concluded only after credit was approved.

She denied that there was a difference between a courier service using containers and one with an in-house system. Containers were used depending on volumes irrespective of whether there was an in-house system processing the movement of parcels.

She agreed that Ms Venter's e-mail of 11h06 on 10 February 2004 was sent before the conclusion of the agreement. See A4-5. She agreed that it showed that the defendant wanted to accommodate the plaintiff.

She was referred to Mr Permal's e-mail dated 11 February 2004, and sent at 4h39 pm to her. She agreed that the client who had to advise by the Friday whether he found the PX option acceptable, was Kent. PX containers were small containers that were presented as an alternative to pallets. The PX containers were not part of the in-house system. They were part of a solution.

The client, Kent, did accept the PX solution. Mr Permal was present when the PX containers were delivered at Kent's. She insisted that the PX containers had already been delivered when the e-mail dated 11 February 2004 4h39 pm (A4) was sent. Kent wanted to see how the service was operated.

She would have responded to this e-mail because she was in daily contact with the defendant. The response was by way of a verbal communication.

She conceded that the containers could have been delivered after the 11th February 2004, but then they must have been delivered before the 20th February 2004.

She conceded that only Mr Hendricks had authority to conclude a contract on behalf of the respondent.

When the agreement on 11 February 2004 was concluded, costs were not discussed either. They worked with rates already agreed upon between the plaintiff and the defendant in respect of other clients.

The plaintiff had various accounts with the defendant relating to various customers. The plaintiff could get separate credit limits for individual customers.

An in-house system was something new for the plaintiff.

The meeting on 11 February 2004 was for the supply of the printer. That would have completed the in-house system. At that time the software had already been installed.

It was put to her that in the particulars of claim it was stated that the software had not been supplied. She answered that it had to be upgraded to make the printer functional. She did not mention the upgrade of the software because she was not asked about it.

The mini in-house system that was operated at Kent was operated with small volumes.

She was asked why, if a date of installation had been agreed on 11 February 2004, was it necessary to ask a date and time for the implementation of the in-house system. See A7, the e-mail of 11 February 2004, sent at 9h57. Her answer was that she knew how it worked in practice. She had to set a date. One could never guarantee what an IT department would do.

The meeting on 11 February 2004 was not about the date, but about the full in-house system.

She gave the time of 23 February 2004 (in the application) because things always go wrong. When she wrote “ASAP 23 February” she meant that the installation should be done earlier if possible.

She could not remember every word that was spoken, but she could remember that XPS agreed to install a full in-house system.

A reason why she asked for a date of installation was that she was hoping to get an earlier installation.

At the time she had no other clients with a full in-house system.

She recruited Mr Bongane to operate the mini in-house system.

She denied that her request for a date of installation showed that there was no agreement. By asking for a date of installation she was trying to put pressure on XPS.

She denied that she did not report back to XPS regarding Kent's attitude in respect of the PX containers.

Mr Bongane would confirm that software for a mini in-house had been installed.

She agreed that nobody from XPS had told her that there had to be an upgrade. That was her own inference.

She was asked why Ms Venter would ask her for customer details on 13 February 2004 at 15h51. See A7. She answered that she did not know. She suggested that Ms Venter might have thought that it was easier to get the particulars from her.

When she worked at XPS she did not handle an application for an in-house system. She cannot recall that she completed an application for a mini in-house system. She agreed that on B25 she was given a choice between a mini and a full in-house system.

Kent gave the plaintiff part of its business to prove that it had the technology to provide a service. The plaintiff could only prove that properly when the full in-house system was installed. The plaintiff needed the agreement to show its capacity.

The application forms were signed after 11 February 2004. It was an administrative procedure that made sense. The defendant had to update its records.

She said that she did not respond in writing to Ms Venter's e-mail of 13 February 2004 sent at 15h51 (A7). It appeared, however, that she did respond to it on 13 February 2004 at 22h47 (see A8).

She was asked why she again asked on 15 February 2004 when XPS would arrive to effect the installation. See A9. She explained that she was anxious.

She was referred to Ms Venter's e-mail of 16 February 2004 sent at 8h46 am (A12) and it was put to her that there would have been no contract before she signed an application. She answered that she was told that it would be a formality. It was not her fault if the defendant skipped its own procedures.

When she was referred to B24, the document giving the reasons for the rejection of her application, she described it as fraudulent.

She accepted that she could have faxed B25, 26 and 27 (parts of the application) to the defendant. When she was told that Ms Venter's handwriting appeared on B24 she was prepared to accept that it was not fraudulent.

XPS told her of its requirement of a R50 000.00 turnover at Kent. She informed XPS of the possible turnover. If she was asked she could easily have obtained confirmation from Kent.

The e-mail of Ms Venter on 18 February 2004 (A18) came as a surprise.

She was asked whether she reacted to. She answered that it came at a time when her account was put on hold. She thought she would have responded but there was nothing in the file. She

did speak to Ms Venter and she phoned Mr Hendricks, but he refused to answer his cell phone.

She was referred to her letter to Mr Sotyato on 19 February 2004 (A19) and it was pointed out that she did not deal with the issue of the in-house system. She explained that she could not deal with both issues.

She did speak to Kent, but they were not stranded because they still had RTT as their service provider.

She denied that she told Ms Venter that she would approach Berco as her service provider. Berco was her opposition.

It was pointed out to her that her attorney's letter of 20 February 2004 (A21) did not mention any breach of contract. She answered that her priority was to get her account active again. Then she would be in a position to negotiate with XPS about a printer.

It was put to her that the question of breach of contract was not mentioned because she accepted the position that her application for a full in-house system had been rejected. She answered that if her account had not been put on hold she would have been able to discuss the matter of the printer.

It was put to her that the fact that she asked for a date of installation in three e-mails (one on 11 February 2004 and two on

13 February 2004) showed that there was no agreement. She repeated that there was an agreement.

It was put to her that she could not bind the defendant and that authorization was required. She answered that she could bind the defendant by the verbal agreement. She did not agree with a statement that PX containers were not used in an in-house system.

It was put to her that XPS was used in an in-house system. She explained that XPS was the defendant's trading name. One could not say that RTT, for instance, used XPS.

In this case the customer wanted an in-house system. XPS wanted PX containers, not large containers.

The defendant did not want to use large containers because it was afraid that large pallets would break.

In re-examination she referred to an e-mail dated 4 February 2004 sent by Mr Ben Burger to Mr Permal in which he said "go ahead". Mr Burger was the defendant's national sales manager. He had the authority to enter into agreements.

She referred to Ms Venter's e-mail on 9 February 2004 to her in which Ms Venter said that Mr Permal thought that they had to get the in-house going as quickly as possible so that they could pick up the business as soon as the client saw that they could handle the volumes. See A6.

The reason why they agreed on the date of 20 February 2004 was that they wanted to prove during the rest of the month that they could handle the volumes.

She could not understand the allegation in B24 that she could not give turnover figures because she had told Ms Venter that the business would amount to almost R100 000.00 per month.

That concluded the evidence on behalf of the plaintiff.

An application for absolution from the instance at the end of the plaintiff's case was dismissed.

On 30 March 2009 the defendant asked to recall Ms Oosthuysen to put to her the version of two witnesses with whom it had not consulted previously. The application was granted.

When it was put to Ms Oosthuysen that Mr Permal would say that the PX system was offered as an alternative option, she answered that mini containers would only be used for pallet freight. Other freight would still go through the normal courier system. Kent would use both systems. RTT was using the so-called XPS system with an in-house system. The PX option was part of the whole solution.

She was asked whether she told Mr Permal that she had concluded an agreement. She replied that he was only there to evaluate operational requirements. He had to find a solution for the incompatible freight.

It was put to her that her indication in the application dated 17 February 2004 that installation had to be effected by 23 February 2004 was at variance with the particulars of claim. She answered that the 23rd February 2004 was the utmost stretch.

She was referred to C23, a document dated 23 March 2003, relating to a mini in-house system for the University of Pretoria. She acknowledged that she wrote the name "Gideon" at the top and that she did the typing. Otherwise she could not remember the matter. She never got the contract.

The first witness for the defendant was Mr Victor Hendricks, who, in 2004, was its acting national sales manager.

He denied that he concluded an oral agreement with the plaintiff as alleged in the particulars of claim.

He described the procedure for the installation of an in-house system. The sales person would make an analysis of the business with regard to volume and money. If the money value was more than R80 000.00 a contract would be considered. The operations staff would also be involved. An FMR would be required. Eventually he would have to make the decision. Then there would have to be an application to the IT department. They had to find the equipment and install a land line.

He could recall the application for an in-house, B25-27. The decision was no. There was no supporting documents in respect of profitability and no FMR.

He confirmed the reasons for refusal as recorded in B24. He denied that he undertook to Ms Oosthuysen to provide an in-house system.

There could have been discussions about the possibility of the installation of an in-house system, but there first had to be a full feasibility study.

With reference to Mr Permal's e-mail sent on 11 February 2004 at 16h39 to Ms Oosthuysen (A4) he explained that Mr Permal considered the PX solution to be more appropriate in view of the size of the freight.

Defendant had two divisions: the XPS division and the PX division. Each division had its own staff and vehicles. They were not separate corporate entities.

He cannot remember that he had any further discussion after he had turned down the application.

He agreed that he had a meeting with Ms Oosthuysen, but added that it was primarily a meeting with the client Brother, whose representative did not arrive as a result of an accident. There was a casual discussion about the installation of an in-house system at Kent. He could not make a decision because he needed information on feasibility. He said that to Ms Oosthuysen. He thinks she accepted it because she was aware of the defendant's procedures. That was the end of the matter.

He left the defendant in 2006. He never consulted with anybody about this case until three weeks before he gave his evidence.

He was aware that the personnel of the defendant had been looking at the possibility of a full in-house at Kent. Mr Permal seemed to be positive, but he inclined towards an PX solution.

The IT division would become involved after he had given the go-ahead. They would be involved only after approval. They would not take any steps before there was authorization.

He did not know that at 11 February 2004 XPS was handling small parcels at Kent. It was possible that there could have been a trial run in respect of small parcels.

Mr Permal had no authority to suggest the installation of a full in-house system.

The defendant could run both a PX as well as an XPS system. Both systems or divisions fell under the umbrella of the defendant. If both systems were applied there would be separate invoicing. One could combine both systems if the volumes justified it.

Mr Permal would not have had any grasp of the issue of feasibility.

RTT run a full in-house service at Kent. It used big containers. The service it provided was a combination of what XPS and PX would be. It was a total solution.

His obligation was to look at the courier business only. Technically he could look at the PX side. The plaintiff's application was for an XPS service for smaller parcels.

He agreed that the defendant had everything to gain if RTT could be supplanted.

He was referred to an e-mail sent by Ms Venter to Ms Oosthuysen on 9 February 2004 at 14h29. See A2. He agreed that it appeared from it that Mr Permal thought that the defendant could cater for Kent's needs. With regard to the reference to the organising of software, he agreed that the IT department would not react without his blessing. To the extent that Ms Venter said that she would start organising software, she had no authority to do so. What Ms Venter wrote in the e-mail in this regard was not procedure.

What was required was not only figures but a full FMR. What Ms Venter was asking in this e-mail was full details for the purposes of an FMR.

On 11 February 2004 he told Ms Oosthuysen to give the necessary information to Ms Venter. He told her that he needed full information for an FMR.

He agreed that after the meeting on 11 February 2004 Mr Permal referred to a full in-house. See his e-mail to Ms Venter sent on 11 February 2004 at 16h39, A4. Mr Permal had no authority. He agreed that it appeared from this e-mail that Mr Permal saw the possibility of a combination of PX and XPS systems from an operational point of view. It was not, however, for him to decide. The final issue was whether it was feasible.

He was referred to the e-mail of Mr Ben Burger to Mr Permal, sent on 12 February 2004 at 7h53. It said "Go ahead, the customer is supplying the hard and software". See A4. He pointed out that the customer could not provide the software.

Mr Burger should have known that information was required before a decision could be made. Mr Burger was a regional sales manager who reported to him. He could not say why Mr Burger sent the e-mail. He know what the defendant's internal regulations were.

He could not remember whether he was shocked when he received Mr Burger's e-mail. He would have asked Mr Burger to set the record straight.

Ms Venter, who was also an addressee of the e-mail, would also have objected to it.

The e-mail was discussed with Mr Burger. Mr Burger said that he could not remember why he answered in that fashion. He could not remember what preceded it.

He accepted that Mr Burger had no ulterior motive. He was referred to Ms Oosthuysen's e-mail of 11 February 2004 sent at 21h57 to Ms Venter which she asked for a date during the next week for the installation of the in-house. See A3.

It was also sent to him. He could not remember what his reaction was.

He had a discussion with Ms Venter on 11 February 2004 after the meeting with Ms Ossthuysen. He told her that without information he could not approve of a full in-house. Ms Venter knew what was required.

He was referred to Ms Venter's e-mail sent on 13 February 2004 at 15h51 in which she said that it would take 7 days to get the software for the in-house. See A7. He agreed that this seemed to be an answer to the request for a date for the installation of the in-house. The problem with the answer is that he had given no approval.

He agreed that there was no indication in the e-mails that information was required for an FMR.

There was mention in the e-mail of 13 February 2004 of an application of an administrative nature.

The e-mails could have created an expectation, but the client was fully aware of what was required.

He would not have relied on the client's estimate of expected turnover. He would have approached Kent.

He was referred to Ms Venter's e-mail dated 16 February 2004 sent at 8h46 to Ms Oosthuysen. See A12. He agreed that it did not refer to him and suggested that after a form was signed the matter would be referred to the IT department. He agreed that it created the impression that approval had been granted.

When he was asked why he rejected the application he answered that he did not think that he had rejected it. It was not considered because of a lack of information. He would not reject it because information was still outstanding.

He was referred to Ms Venter's e-mail dated 18 February 2004 at 12h40 to Ms Oosthuysen. See A18. He agreed that it created the impression that Ms Venter had a discussion with him on that very day. The Zebra printer was required for an in-house. His concern was the cost of a new printer. It made no sense to spend money on a new printer without an FMR.

In view of the fact that Ms Oosthuysen was an existing client, he would have been prepared to provide her with a spare Zebra printer.

There were 65 Zebra printers in Gauteng but it could take months before one became available.

He was referred to B24, the fax message dated 17 February 2004. He explained that Ms Oosthuysen sometimes used the defendant's Centurion office to send faxes to Ms Venter in Johannesburg.

He was referred to the allegation in the fax that he turned down the application. He confirmed that he did not approve or reject the application.

It was put to him that the issue was the supply of a Zebra printer. He answered that it was part of the problem. The defendant would not supply new equipment if the project was not viable. It would be prepared to assist with a second hand printer.

The application form B25-27 had to be signed by him. It was not completed in the appropriate spaces on B25 because the FMR was not forthcoming. He had to return the application down because there was no information and no FMR.

He was referred to Ms Venter's e-mail sent on 18 February 2004 at 12h40 (see A12) and referred to the fact that only reference was made to the cost of a new Zebra printer. He said that that was Ms Venter's interpretation. She was a typical saleslady, always positive.

It would have been Ms Venter's task to inform the client of the rejection of its application.

He confirmed that B25-27 was in internal document and normally not to be signed by the client.

On 11 February 2004 Ms Oosthuysen mentioned the possibility of an in-house. He mentioned it in passing that it would be evaluated if there was a full FMR.

Mr Desmond Permal was the defendant's branch or operations manager in February 2004. His responsibility was to ensure that parcels were collected and that they reached their destinations.

He confirmed the e-mail sent on 11 February 2004 at 16h39 that he sent to Ms Oosthuysen, but actually addressed to Ms Venter. The e-mail was sent after he had visited the premises of Kent with Ms Oosthuysen. At the premises he saw pallets that were incompatible with the defendant's XPS vehicles and he suggested that a PX service would be compatible. If the PX service was satisfactory the plaintiff would be able to obtain the contract for the rest of the client's parcels, being smaller parcels.

Ms Oosthuysen did not inform him that she had concluded an agreement with Mr Hendricks and Ms Venter. She did not even tell him that she had met them earlier that day.

An in-house system was not needed for a PX service because only containers are identified, not individual items.

He had no reaction to the e-mail and he did not have any further involvement in the matter.

On that day he visited Kent's premises for the first time.

Ms Oosthuysen said that she would like to have a full in-house if she could get the contract for the small parcels. She said that if Kent used the PX service she would get the small parcels business.

The defendant was already moving small parcels from Kent's premises. The defendant was using pre-printed weighbills on which the particulars of consignees had to be entered by hand. He was not aware of the fact that that operation was in fact a trial run.

He would not say that the plaintiff was at the time running a mini in-house system at Kent.

With a mini in-house system the defendant would have no one on the premises. There would be a printer but not one that printed bar codes.

He agreed that it was Ms Oosthuysen's aim to get the whole account of Kent.

He was referred to Ms Venter's e-mail sent on 9 February 2004 at 14h49 to Ms Oosthuysen. See A2. He was referred to the statement that he thought that the in-house had to be started as soon as possible because they would pick up the business once

Kent saw that they could handle the volumes. He said that the key phrase was “once they saw that we can handle the volumes”.

As he saw it the PX service would be the foot in the door. Then, if the rest of the business was obtained, a full in-house would follow.

He agreed that a full in-house system would have been necessary to accommodate all the volumes handled by RTT.

He was referred to Ms Oosthuysen’s request for a date for the installation of the in-house. See the e-mail sent on 11 February 2004 at 21h57. It was also sent to him. He was asked what his reaction was. He said that it did not concern his functions. He also did not know what Ms Oosthuysen and Ms Venter had discussed.

When referred to the e-mail sent by Mr Burger on 12 February 2004 at 7h53 he answered that the client could not supply software. He was not prepared to infer that the e-mail referred to the installation of a full in-house, including a Zebra printer.

He was referred to Ms Venter’s e-mail sent on 13 February 2004 at 15h51 referring to the software set up for an in-house. He declined to comment on it without knowledge of what had been agreed.

The defendant’s last witness was Ms Dawn Venter.

She was a sales representative with the defendant in February 2004. She had no authority to conclude agreements in respect of XPS services. She resigned in 2006.

She had discussions with Ms Oosthuysen regarding an in-house system at Kent.

She confirmed her e-mail on 9 February 2004 sent at 14h49. See A2. Ms Oosthuysen wanted to do the parcels business.

With reference to the e-mail sent by Ms Oosthuysen on 11 February 2004 at 9h57 (asking a date and time for the installation of the in-house) she denied that there was an agreement for the installation of an in-house. The defendant had no details of the client (Kent).

In her answer on 13 February 2004 sent at 15h51 (see A7). She asked for the client's details such as figures to show viability. The seven days for installation would run from Mr Hendrick's approval.

With regard to Ms Oosthuysen's e-mail of 15 February 2004 sent at 20h49 (A9) asking when XPS would arrive at Kent for installation, she said that Ms Oosthuysen was pushy and domineering.

In her e-mail of 16 February 2004 sent at 8h46 (see A12) she was once again pressing for details. They were never supplied.

She explained that the application form B25-27 was faxed to Ms Oosthuysen and that she faxed it back after having completed it.

She took the application to Mr Hendricks. Ms Oosthuysen never supplied the figures. She could not remember a figure of R100 000.00 per month.

She confirmed that she wrote the reasons for the rejection of the plaintiff's application on B24. It was done after the event for the own purposes.

Mr Hendricks decided that they could not proceed. They needed figures. The in-house system was needed for small parcels. The defendant said that it could not handle pallets. It had to be a PX service.

She confirmed the reasons for rejection stated in B24. Another reason was that the plaintiff's account was on hold.

She was asked what she meant when she said in her e-mail of 18 February 2004 that the request for an in-house could be set in motion if a second hand Zebra printer became available. See A18.

They were told by the accounts section that there was a problem with the plaintiff's account. The non-payment of the account was the main reason for the rejection of the application.

In cross-examination she stated that she only consulted in this case three weeks before she gave evidence.

She denied that there was any discussion of an in-house system at Kent on 11 February 2004. Only the accounts of Brother and BMW were discussed.

Before 17 February 2004 there was a verbal application for an in-house.

The application could not be considered unless it was in writing.

The prime reason why the application was rejected was that the plaintiff's account was on hold.

She was asked why Ms Oosthuysen was not told what information she had to furnish. She answered that she knew. She had worked for the defendant.

She confirmed that no steps could be taken until the application had been approved.

According to her Mr Permal was not satisfied that there were enough parcels at Kent for an in-house system.

She did not know that Ms Oosthuysen was after the work of RTT. Ms Oosthuysen had to come back by Friday 20 February 2004 on the issue of the PX service, but she never did.

When asked about Mr Burger's e-mail in which he said: "Go ahead" (see A4) she said Kent must have referred to the PX service.

When asked why she did not respond to Ms Oosthuysen's e-mail of 11 February 2004 sent at 21h57 (A7) by telling Ms Oosthuysen that she must be labouring under a misunderstanding, she answered that she told Ms Oosthuysen many times in telephone conversations and e-mails what the position was.

She conceded that it was not necessary for Ms Oosthuysen to sign the application for an in-house. It had to be completed. Ms Oosthuysen had to supply the details. She had to fill in the form. The form was needed to procure equipment from the IT department.

She was asked where were the e-mails in which she asked Ms Oosthuysen to give an FMR. She answered that on her resignation everything on her computer was deleted.

She was referred to an e-mail sent to her by Ms Oosthuysen on 11 February 2004 at 8h25. In it she complained about the defendant's service. She answered that this e-mail related to the plaintiff's account.

When referred to the defendant's plea, she made it clear that she was not the source of the allegations contained in it.

It was pointed out to her that the application for an in-house (B24-27) was transmitted on 17 February 2004 at 16h34. She was asked why it was said in the plea that the application was rejected on 17 February 2004. She said that she could have discussed the application with Mr Hendricks on 18 February 2004. She was referred to her e-mail of 18 February 2004 (see A18) in which she said that she had just discussed the matter with Mr Hendricks.

She was asked about her suggestion in that letter that the request for an in-house could be re-activated if a Zebra printer became available. She said that that could only happen if the Kent account justified it.

Even if Ms Oosthuysen managed to get a printer there would still be the problem of her account.

She was asked why she did not say in her e-mail of 18 February 2004 that the application had been turned down. She replied that she meant to say that it was turned down. She did not leave a door open. She could not remember why the other reasons for the rejection of the application were not stated.

She only heard later that the account was put on hold. When asked in re-examination whether the so-called agreement related to an in-house system or to a PX system, she answered that it related to a PX system. The defendant could not handle the bulk of the freight which consisted of pallets.

There had to be a separate agreement for a PX system. There was no application for a PX system.

The court has to decide the issue of liability in respect of the plaintiff's claim. The issues of the quantum of the plaintiff's claim and defendant's counterclaim, have been postponed sine die.

The main factual issue is whether an agreement was concluded on 11 February 2004 in terms of which the defendant would install a full in-house system at Kent on or before 20 February 2004.

It is convenient at this stage to record some impressions of the witnesses and to make some comments on aspects of their evidence.

Ms Oosthuysen did not make a bad impression as a witness. She was sometimes inclined to be dogmatic. She was criticized about why she asked for a date of installation if there was a fixed deadline of 20 February 2004. Her explanation that she wanted to put pressure on the defendant and that she even hoped for an earlier installation was acceptable. The fact that she was prepared to extend the date of installation is not inconsistent with her evidence that there was an agreed date.

At first she described B24 as fraudulent, but when she was told that the body of the text was written by Ms Venter, she readily accepted it.

Her explanation that after 18 February 2004 she concentrated on the issue of her account because it enjoyed priority can be accepted. As it is, the summons was issued on 22 April 2004.

Mr Hendricks was an intelligent witness who, on the whole, fairly made concessions that were necessary. He contradicted himself about whether he had rejected the application for an in-house or merely declined to approve it.

On his evidence the IT department could not have reacted without a go-ahead from him.

He could not explain Mr Burger's e-mail. It must be remembered that it was copied to him. If he saw it at the time he could not have left it there. His later evidence that he discussed the e-mail which Mr Burger sounded like speculation or a reconstruction.

Mr Hendricks could not explain Ms Venter's e-mail of 13 February 2004 (A7). That e-mail, saying how long it would take to set up the software for the in-house, goes against his evidence that on 11 February 2004 he told Ms Oosthuysen that he could not approve the in-house.

He fairly conceded that Ms Venter's e-mail of 16 February 2004 (A12) created the impression that approval for an in-house had been given.

He conceded that he was prepared to assist the plaintiff, being an existing client, with a second hand printer. That makes it not improbable that there could have been approval which was only revoked when it was discovered that there was no second hand printer available.

Mr Permal was not keen to be involved. He mostly avoided sensitive questions by repeating that he was merely an operations man.

His description of what a mini in-house was, came very close to what the plaintiff was at the time operating at Kent. He evaded the question about what Ms Venter said he told her according to her e-mail of 9 February 2004 sent at 14h49 (A2).

Ms Venter tried to explain why Ms Oosthuysen was never asked in an e-mail to produce an FMR by suggesting that there were other e-mails that were deleted from her computer when she left the defendant's employ. It is improbable that such e-mails would have been deleted if one bears in mind when the summons was issued and when she resigned. It is also improbable that they would have been deleted from the computers of staff members of the defendant to whom they had been copied.

Her version that the seven days for installation would run from the date of approval does not accord with her e-mail of 13 February 2004 sent at 15h51 (A7).

She gave the fact that the plaintiff's account had been put on hold as one of the reasons why the application for an in-house was refused. Later she gave it as the main reason. It was not pleaded. It appeared that on 17 February 2004 the account was not yet on hold.

Her evidence that an in-house service was not discussed at all on 11 February 2004 is in contrast to the evidence of Mr Hendricks.

She denied any knowledge of Ms Oosthuysen's aim to capture the business of RTT. It is strange that she would not have been aware of it, especially in view of Mr Permal's e-mail of 11 February 2004. See A4.

Her explanation that Mr Burger in his e-mail of 12 February 2004 (see A4) must have referred to the PX service, makes no sense.

She was wrong in saying that her e-mail of 18 February 2004 (A18) said that the application had been turned down and that it did not leave the door open. She could not explain why the reasons for the rejection given in her evidence were not stated in the e-mail.

In the end she said that the negotiations were aimed at an agreement for a PX service. That was never pleaded and it does not explain the application for an in-house system.

On the facts there are two mutually destructive versions before the court as to whether an agreement was concluded on 11 February 2004.

The court cannot resolve the dispute on credibility alone. It has to be resolved with reference to the probabilities.

Mr Seleka, who appeared for the defendant argued that the evidence shows that the parties were only negotiating but never reached consensus on all the material terms. He did not, however, argue that there had to be consensus on both the PX and XPS solutions before there could be agreement on the overall solution. He in fact argued that there had to be separate agreements in respect of the PX and the XPS systems.

Although it is clear to me that Ms Oosthuysen pursued an arrangement whereby the plaintiff would replace RTT both in respect of bulk freight and courier service, it is clear that on her evidence that there was an agreement on the in-house system. She was amenable to the PX option and she had reported to the defendant that Kent also found it acceptable. On her version the fact that the issue of the PX service was not canvassed with Mr Hendricks on 11 February 2004, did not detract from the agreement that was reached on 11 February 2004.

If I consider the evidence of the witnesses, their merits and demerits and the probabilities, I find it more probable that an agreement in respect of the provision of an in-house system was concluded on 11 February 2004.

The e-mails show that steps were taken for the preparation of the installation of such a system. There is no evidence in the e-mails that Ms Oosthuysen was called to order and told that there was no agreement and that she first had to submit an FMR. The application on which the defendant placed so much reliance, turned out to be nothing more than an internal interdepartmental requisition form, as a rule not even to be signed by the client. The way in which the so-called rejection was communicated to Ms Oosthuysen shows that the problem was the non-availability of a second hand printer, and not a lack of financial data.

There was an important difference between Mr Hendricks and Ms Venter about whether an in-house was discussed on 11 February 2004. On Mr Hendrick's version it made no sense that Ms Venter would be engaged in discussions about the date and time for the installation of a full in-house.

Ms Oosthuysen consistently acted like someone who believed that she had concluded an agreement. If there had been no agreement her requests regarding the date and time for installation must have been sheer effrontery.

Ms Venter tried to say that there was not enough parcels at Kent for a full in-house. That was not the evidence of Mr Permal, who said that if regard be had to RTT's business there were enough small parcels to justify a full in-house system. As I have said before, she should have been aware of this. In fact, it must have been obvious that if RTT was operating a full in-house system, the volumes must have been sufficient to justify it. For

that reason it would have been understandable why there was no insistence on an FMR.

Then there was the failure to call Mr Ben Burger. His e-mail clearly justifies the conclusion that an agreement had been reached on 11 February 2004. It was so irreconcilable with the evidence of Mr Hendricks and Ms Venter that they were at a loss to explain it. Mr Burger was senior enough that he would have known whether there was a factual basis to give a go-ahead. He was available as a witness and if he could have given an innocent or neutral explanation of the e-mail, the defendant should, and no doubt would, have called him. It was not for the plaintiff to have called him, because the e-mail, as it stands, suited it perfectly.

For all these reasons I conclude that as to what happened on 11 February 2004 the probabilities favour the plaintiff's version.

The plaintiff alleged in paragraph 7 of its particulars of claim that the refusal to deliver the computer software and printer on 20 February 2004 or within a reasonable time thereafter constituted a repudiation of the agreement. It is alleged in paragraph 8 that the repudiation was accepted either previously or by way of the summons.

Although the letter dated 18 February 2004 may be construed as not being an unqualified refusal to deliver a printer, it is clear from the evidence that the defendant did indeed repudiate the agreement. There was no evidence that the repudiation was accepted before the issue of summons. The date of service of the

summons, being the 6th March 2004, must therefore be accepted as the date on which the contract was cancelled.

It is not clear to me on what basis damages could be claimed for a loss of income until October 2005 but that is an issue of quantification with which I need not concern myself.

In paragraph 10 of the particulars of claim it is alleged that the plaintiff had agreed with Kent that as soon as the in-house system was installed, Kent would allow the defendant to handle 100% of its courier freight. The evidence about whether there was an agreement with Kent was vague, but Mr Seleka accepted that the issue of the agreement with Kent was an issue that more properly belonged to the quantum enquiry.

A problem that I have is whether the plaintiff would have been able to use the defendant as its subcontractor where its account had been put on hold. It appears that it must have been on hold at the latest from 23 February 2004. That is not a question of quantification, but of causation, which is a prerequisite for liability.

It is common cause that the suspension of the account has endured to this very day. Whether the suspension was justified, will only be determined when the counterclaim is adjudicated.

If I look at the evidence, it shows that the breakdown came when the account was suspended. Ms Oosthuysen said that she had to focus her attention on the issue of the account.

For that reason she could not pursue the suggestions conveyed in the letter of 18 February 2004 or even attempt to see whether she could provide the printer herself. Seen from that perspective the cause of the plaintiff's loss was the suspension of the account. If it was unjustified it may provide a cause of action for any loss sustained.

In my view the suspension of the account was a supervening event that superseded the effect of the repudiation. It can be tested in this way: the plaintiff cannot demonstrate that but for the repudiation of the agreement it would have traded with Kent with the defendant as its service provider. There would have been no trade until the suspension was lifted.

Mr Botes, who appeared for the defendant, argued that the suspension only affected the plaintiff's account in respect of other clients. He submitted that the Kent account was not affected by the suspension. There is no indication in the correspondence that that was the position. It is true that the evidence was that the plaintiff used the defendant as a service provider in respect of other clients (such as Brother, BMW etc) and that the plaintiff had an account for each client. The evidence was also that there was a separate credit limit for each account. All that does not mean that the suspension did not relate to the overall account. It would be most improbable and even unbusinesslike if the defendant were to allow the plaintiff to use its services on some accounts whilst others are suspended.

The fact is that the correspondence does not indicate that the suspension was confined to certain accounts. For what it is worth it appears from a letter dated 22 January 2004, attached to the application for security for costs, that on the Kent contract an amount of R26 785.99 was outstanding. The total outstanding amount at that stage was R236 460.45. It related to 5 account numbers. I repeat: the further correspondence did not refer to specific accounts, only to the globular indebtedness.

In **Hart and Honoré, Causation in the Law at 250** the following is said:

“But in civil law the position is different. Compensation is there given for the infringement of some right and where economic loss is concerned, plaintiff only establishes the right to compensation when he shows that, in the absence of the wrongful acts on the part of the defendant or anyone else, he would have enjoyed the relevant economic advantage.”

That is applicable in this case. The plaintiff has failed to prove causation and therefore there is no reason to consider the issue of quantum. The claim must be dismissed.

The following order is made:

The plaintiff's claim is dismissed with costs.

C. BOTHA
JUDGE OF THE HIGH COURT