IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL LOCAL DIVISION, DURBAN

CASE NO: D11539/2022

In the matter between:

TOTALGAZ SOUTHERN AFRICA (PTY) LTD	**PLAINTIFF**
and	
SAPLING TRADE AND INVEST 26 (PTY) LTD	**FIRST DEFENDANT**
NEIL SOLOMON	**SECOND DEFENDANT**

ORDER

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1. The first and second defendants are absolved from the instance.
2. The plaintiff is directed to pay the first and second defendants' costs of the action, on scale B.

JUDGMENT

Shapiro AJ

[1] The plaintiff is a supplier of liquid petroleum gas ("LPG"), among other products. From 2015 to 2020, the plaintiff supplied the first defendant with LPG. After an unresolved dispute arose between the parties about the supply of gas and whether the amounts invoiced by the plaintiff were accurate, the plaintiff terminated its relationship with the first defendant and then instituted the action that served before me. The second defendant was cited as surety in respect of the first defendant's alleged debt to the plaintiff.

[2] At its core, the first defendant's defence was that it had paid all amounts that legitimately were due to the plaintiff and that the balance for which the plaintiff sued was not due as it was in respect of over charged amounts for LPG that had not been supplied by the plaintiff[1].

[3] At the close of the plaintiff's case, the defendants applied for absolution from instance on the basis that there was no evidence upon which I could or might[2] find that the plaintiff had established the amount of its claim and its concomitant entitlement to judgement in the amount that it claimed or any other amount.

[4] I am grateful to counsel for the plaintiff and defendants, Mr Cassan and Mr Hoar, for their helpful submissions during the application for absolution.

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[1] In the Statement of Issues in terms of Rule 37A(9)(a) which was submitted by the parties, two of the issues in dispute were agreed to be "whether the First Defendant is indebted to the Plaintiff...in the amount of R1,342,531.74" and "whether the amounts claimed by the Plaintiff are over charges for which the First Defendant is not liable".

[2] *Gordon Lloyd Page & Associates v Rivera and Another* 2001 (1) SA 88 (SCA) at para [2]

[5] The plaintiff led the evidence of two witnesses. Mr Siboniso Kunene is the legal manager of the plaintiff and has employed in that capacity since 1 February 2023. Mr Ryno Maree was the Logistics Manager of the plaintiff at the time of the dispute and was involved in investigating first defendant's complaint that it had been charged for more gas than had been supplied to it at its two sites[3] in respect of at least 140 deliveries during 2019.

[6] Prior to Mr Kunene testifying, the plaintiff handed up five trial bundles that included about 330 pages of delivery notes and invoices. In line what had been agreed between the parties at a pre-trial conference[4], Mr Cassan submitted that it had agreed that the documents contained in the five volumes were what they purported to be, but that there was no agreement about the truth of the contents of those documents.

[7] In respect of the invoices and delivery notes that underpinned the plaintiff's claim, Mr Kunene testified that the documents formed part of "the company records" and that he had gone through the documents in detail. Mr Kunene went through the statement of account in which the balance allegedly due by the defendants was quantified, confirming that the document[5] was the statement of account and then explaining how payments made by the first defendant were appropriated by the plaintiff to the oldest debts first.

[8] During cross-examination, Mr Kunene accepted that first defendant had disputed its indebtedness from May 2019 and had complained that it had been charged for more gas than factually had been delivered to it. Mr Kunene correctly avoided commenting on the truthfulness or factual accuracy of what was contained in the documents or correspondence through which he was taken, in circumstances where the best that he

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[3] In Pinetown and Pretoria

[4] In its Agenda in terms of Rule 37(4), the plaintiff proposed that "...documents may be used as evidence without formal proof thereof and...such documents are what they purport to be without any admission being made as to the truth of the contents thereof". In the minutes of the pre-trial conference held between the parties on 13 July 2023, and under the section headed "Evidential Value of Documents", the parties "recorded that the documents are what they purport to be".

[5] Annexure "E" to the Particulars of Claim, dated 28 February 2021

could do was to confirm that the documents formed part of the plaintiff's records relating to its claim against the defendants.

[9] Mr Maree testified about his role in the investigation of the first defendant's complaint. He was not personally involved in any of the deliveries disputed by the first defendant. Mr Maree's evidence related more to the reliability of the gauges installed respectively on the third-party contractor's tankers that delivered the gas to the first defendant on behalf of the plaintiff and the gauges that were installed on the first defendant's bulk tanks at its premises and which gauges should be relied upon to confirm the amount of LPG that was actually delivered to the first defendant.

[10] Whilst I have reservations about whether this evidence was admissible, given that Mr Maree testified as a factual witness and not as an expert, I am not required to consider that question at the stage of the application for absolution.

[11] Proving the underlying transactions reflected in a running account is a trying business. In argument before me, Mr Cassan described the process of proving each transaction as "laborious". In this, he is undoubtedly correct but a burden in proving a case does not mean that the burden of proving a case can be either diluted or ignored.

[12] Mr Cassan argued that the relevant delivery notes and invoices were properly before me as they were proof of what they purported to be. He submitted that the delivery notes were ostensibly signed by a representative of the first defendant and that *prima facie* there was therefore sufficient evidence before me about the contents of those documents. Put differently, I was asked to accept the truth of the documents because they were what they purported to be – and there was no countervailing evidence about the contents of those documents.

[13] There is however a material difference between "proof of what [a document] purports to be" and the "admission of the truth of the contents" of that document.

[14] The supreme Court of Appeal had the following to say about this distinction in the case of *Rautini*[6]:

'[8] This appeal raises the important issue regarding the admissibility of the contents of discovered documents, without the author having to testify about the correctness of the contents thereof…

[9] Section 3(1) of the Law of Evidence Amendment Act 45 of 1988 (the Law of Evidence Amendment Act) reads as follows:

'(1) Subject to the provisions of any other law, hearsay evidence shall not be admitted as evidence at criminal or civil proceedings, unless –

(a) each party against whom the evidence is to be adduced agrees to the admission thereof as evidence at such proceedings;

(b) the person upon whose credibility the probative value of such evidence depends, himself testifies at such proceedings; or

(c) the court, having regard to –

(i) the nature of the proceedings;

(ii) the nature of the evidence;

(iii) the purpose for which the evidence is tendered;

(iv) the probative value of the evidence;

(v) the reason why the evidence is not given by the person upon whose credibility the probative value of such evidence depends;

(vi) any prejudice to a party which the admission of such evidence might entail; and

(vii) any other factor which should in the opinion of the court be taken into account,

is of the opinion that such evidence should be admitted in the interest of justice.'

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6 *Rautini v Passenger Rail Agency of South Africa* (853/2020) [2021] ZASCA 158 (8 November 2021)

[10] The record indicates that the appellant's counsel in his opening address at the trial expressly stated that the discovered documents are what they purport to be, but that the correctness of the contents was not admitted...

[11] The contents of the hospital records and medical notes constituted hearsay evidence, and it is trite that hearsay evidence is prima facie inadmissible. The discovery thereof by the appellant in terms of the rules of court does not make them admissible as evidence against the appellant, unless the documents could be admitted under one or other of the common law exceptions to the hearsay rule.'

[15] In *Sheffryk*[7], and while referring to *Rautini*, the Court held that the inclusion of "all discovered documents are what they purport to be" serves a legitimate purpose because it allows these documents to be discovered as real evidence. However, the court cautioned that "parties should be vigilant and lead the evidence of the authors of those documents if they intend to rely on the contents of the documents."

[16] In circumstances where there was no agreement in respect of the truth of the contents of the plaintiff's delivery notes and invoices, it was not enough for the plaintiff simply to discover those documents and include them in various volumes of trial bundles as an evidential end in itself. Similarly, it was not enough for Mr Kunene to confirm that those documents formed part of "the company records" as if this then made the documents true without further proof of their contents.

[17] The defendants did not rely on a bare denial in their Plea. They disputed their indebtedness to the plaintiff specifically because, according to them, the contents of the invoices and delivery notes were not accurate. No doubt, this is why there was no agreement about the truth of the contents of these documents.

[18] In these circumstances, the plaintiff was then obliged to prove the truth of the

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[7] *Sheffryk v MEC for Police, Road and Transport Free State Province* (4603/2015) [2022] ZAFSHC 142 (3 June 2022) at para [22]

contents of each delivery note and invoice and, to do so, to call the authors of those documents.

[19] The first time that there was an attempt by the plaintiff to link a specific delivery note to its related invoice and then to its inclusion in the statement of account occurred during argument of the application for absolution. However, even then, Mr Cassan asked me to accept the truth of the contents of the delivery note without any evidence from the author of that document.

[20] In my view, Mr Hoar was correct when he submitted that the plaintiff had failed to lead the necessary evidence to establish its claim. The plaintiff did not establish through admissible evidence that it had delivered the volumes of gas alleged and that it therefore was entitled to the judgement that it sought.

[21] In the absence of admissible evidence, there is not any evidence upon which I, applying my mind reasonably, could or might find for the plaintiff. It therefore follows that absolution from the instance was correctly sought by the defendants.

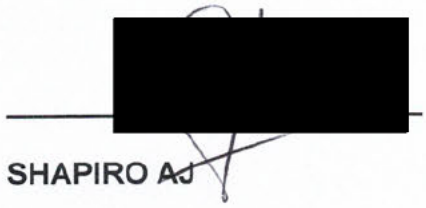
[22] There is no reason why costs should not follow the result.

Order

[23] In the circumstances, I make the following order:

23.1 The first and second defendants are absolved from the instance.

23.2 The plaintiff is directed to pay the first and second defendants' costs of the action, on scale B.



SHAPIRO AJ

Appearances

Counsel for Plaintiff:	Advocate S Cassan
Instructed by:	Brink, De Beer & Potgieter
Counsel for Defendants:	Advocate S Hoar
Instructed by:	Geyser Du Toit Louw & Kitching Pinetown Inc
Date Judgment Reserved:	24 April 2025
Date Judgment Delivered:	05 May 2025