

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED.
<div style="display: flex; justify-content: space-between;"> <div> <p>19/10/2017</p> <p>DATE</p> </div> <div> <p>.....</p> <p>SIGNATURE</p> </div> </div>	

CASE NO: 10408/16

In the matter between:

OVERROX TRADING 42 CC

APPLICANT

and

PAN AFRICA SHOPFITTERS (PTY) LTD

DEFENDANT

JUDGMENT

INTRODUCTION

- [1] In this action the Plaintiff's claims payment of R1 650 867.17 (one million six hundred and fifty thousand eight hundred and sixty seven Rand and

seventeen cents) in respect of costs and disbursements allegedly incurred by the Plaintiff on behalf of the Defendant.

BACKGROUND

- [2] The parties concluded a partly written and a partly oral agreement during July 2015 in terms of which the Plaintiff was appointed as the agent of the Defendant to attend to freight forwarding and custom clearance services involving the shipment of three cargo containers from South Africa to Abuja Nigeria.
- [3] The Plaintiff provided the Defendant with the estimated costs for such services which amounted to R1 354 788.00 (one million three hundred and fifty four thousand seven hundred and eighty eight Rand) plus VAT. The quote excluded certain items such as off-loading at destination, marine insurance for cargo, destination clearance, custom duties and taxes, storage charges, standard time, demurrages and any increases in the statutory costs. On the accepting the quotation, the Defendant agreed to pay 50% of the amount upfront; 40% on the production of bill of lading and 10% on the clearance of the containers in Nigeria. No containers were to be released if payment was not done in advance.
- [4] The Defendant was provided with invoices and paid in excess of R3 million in order to have the goods cleared in Nigeria. There were delays in the clearance and delivery of the containers occasioned inter alia, by a client of the Defendant in Nigeria who at one stage was not ready to receive the goods. Further delays were caused by additional requests to inspect the containers and further inspections of the containers by the Nigerian Custom officials. All invoices submitted were paid except the invoice for the amount paid which is the subject of this action. The original invoices for the claim were in United States of American dollars totalling US\$ 126 823 .25 (one hundred and twenty six thousand eight hundred and twenty three dollars and twenty five cents), converted to South African rands.

- [5] The Defendant contended that the Plaintiff was not entitled to the amount claimed for costs and expenses. It further contended that the Plaintiff was required to prove that it had incurred these costs and expenses. I must mention that contained in the invoice disputed was a significant amount of bribe allegedly paid to the Nigerian Custom official to have the containers cleared and released from the port. This amounts to US\$ 38 250.00 (thirty eight thousand two hundred and fifty dollars). The other amounts which are significant are at US \$ 21 600 (twenty one thousand six hundred dollars) storage (09/10/15 to 14/11/15) Demurrages of three containers for US \$ 23 200.00 and additional taxes for US \$38 216 – 00 (thirty eight thousand two hundred and sixteen dollars)
- [6] It was the Plaintiff's case that it only needed to demonstrate that the costs and expenses were excluded from the quotation and payments amounting to more than R3million which the Defendant had already paid.
- [7] At the hearing of the matter, the Defendant withdrew its special plea. The Plaintiff asked for the costs of such withdrawal. Furthermore, the Defendant, who had filed a conditional counter claim against the Plaintiff, did not lead evidence to prove its case.
- [8] What requires to be determined is whether or not the Plaintiff has successfully proved its entitlement to the amount claimed.

THE EVIDENCE

- [9] The Plaintiff called two witnesses to prove its claim, namely Mr Bheki Ndimande ("Ndimande") and Mr Mohammed Hafejee ("Hafejee").
- [10] Ndimande testified that the Plaintiff was requested by the Defendant to move three cargo containers of shop fitting furniture from South Africa to Nigeria. The final destination was Abuja, Nigeria.

- [11] The containers were to be delivered by the 28 August 2015. The Defendant had made certain payments, it was conceded that R3 832 623.29 (three million eight hundred and thirty two thousand six hundred and twenty three rand and twenty nine cents) had in fact already been paid by the Defendant to the Plaintiff.
- [12] Sometime during August 2015, the Plaintiff was advised by the Defendant that a two weeks delay of delivery was to be expected as the Defendant's customer was not ready to receive the goods. The two weeks delay was experienced from 29 September 2015.
- [13] As a consequence of the delay, there were demurrage charges which were paid up to 14 September 2015. A payment of R1.1million was paid by the Defendant on 7 October 2015 which payment included the three weeks delay period. There was no dispute between the parties on the delays up to the 25 September 2015.
- [14] The Plaintiff undertook to have delivery finalized by either the 8 or 9 October 2015. The goods were not delivered as promised.
- [15] He testified that only when full payment had been received would the container be released. He was not able to shed some light on how it was possible to release the goods, when they were finally delivered, without the full payment having been made.
- [16] Ndimande is employed by the Plaintiff and has significant expertise in freight forwarding and custom clearance services.
- [17] Although he had knowledge that the costs and expenses reflected in the invoice were reasonable, he could not prove that they were in fact incurred. He did not control payment of expenses to the third party service providers.

- [18] He conceded also that the goods only arrived in Abuja, during November 2015 which was more than a month later.
- [19] Ndimande, under re-examination, conceded that the goods were released in Abuja even before payment. He offered no explanation on how it was possible given that payment had to be made in advance.
- [20] The delay according to Ndimande was caused by customs inspection. He was referred to payment of Nigerian Naira 8 936 810.00 (eight million nine hundred and thirty six thousand eight hundred and ten Nigerian Naira) which was made on 10 September 2015. There was no testimony of the South African Rand exchange rate on the amount and whether the payment was made from payment already received from the Defendant.
- [21] Ndimande testified that costs and expenses had to be recouped from the Defendant. He failed to provide evidence that such costs and expenses had in fact been incurred when asked to do so. He also conceded that part of the expenses paid was a bribe for the Nigerian customs official to clear the goods at port. This is referred to as "facilitation commission" in the invoice.
- [22] Hafejee testified that he has 23 years' experience in the freight forwarding sector. During 2015 he was working for himself as a consultant in the shipping sector. The Plaintiff was one of his clients.
- [23] He was involved with the shipment of the three containers in South Africa and in Nigeria to assist with the clearance in Nigeria for the Plaintiff.
- [24] He testified that there was a three months delay of delivery of the containers in Nigeria. One of the reasons for the delay was that the Defendant's client Game, was not ready to receive delivery in Abuja. The delay meant that additional storage charges were going to be incurred on port or private storage.

- [25] He testified that the first 4 (four) days were free of demurrage charges. He testified further that Game wanted to inspect the goods to see if they were in order and that the inspection itself raises alarm in the shipping industry.
- [26] The goods were inspected by Mr Jay who works for the Defendant in Nigeria. He furthermore testified that Jay had told his employer in Nigeria not to inspect the containers.
- [27] He did not support the insistence by Game to inspect the goods as this would cause the Custom officials in Nigeria to be suspicious. After the goods were inspected by Game, the Nigerian Custom officials also inspected the goods and concluded that they were contra bands, meaning fully assembled furniture not allowed to be imported to Nigeria. The Custom officials threatened to increase the duty to ensure that the goods were cleared.
- [28] Hafejee felt uncomfortable with the level of interference by all the related parties. He testified furthermore that there was a threat by the Custom officials to seize the containers.
- [29] Negotiations started with the Nigerian Custom officials and a second duty notification was provided. There was also a strike at the Nigerian port and this caused a further two weeks delay in the delivery of the goods.
- [30] An additional second assessment notice was issued by the Nigerian Custom Authorities for Nigerian Naira 8 936 810.00 (eight million nine hundred and thirty six thousand eight hundred and ten naira) on 7 September 2015. After the negotiations, a goods exit note was provided which confirmed that the goods could be released.
- [31] The goods were loaded on the trucks, pictures were taken and a two day journey to Abuja by trucks commenced to deliver the goods.

- [32] Under cross-examination, Hafejee confirmed that he became aware of the litigation four months before the trial date. He conceded that he handed all the documents relating to the claim to the Plaintiff. He stated that most of the payments were made by him and that the proof of such payments in the form of receipts were at his home. He did not give such receipts to the Plaintiff's attorney and could not provide reasons why he failed to do that.
- [33] He confirmed that there was payment of the bribe to the Nigerian Custom official. He did not pay the bribe himself but was told that the bribe was paid in cash by Leonard in Nigeria. He later changed his testimony and stated that he in fact paid the bribe himself and that he had proof thereof. He was still owed by the Plaintiff the sum of R400 000.00 (four hundred thousand rand). He communicated the payment of the bribe to the Plaintiff.
- [34] His Nigerian agent was a man named Link. Link was the one dealing with Leonard. There was bad blood between Hafejee and Leonard because of the perceived interference, and a recommendation was that his agent Leonard must stand down. He claimed that the money that he had paid was invoiced.
- [35] After the testimony by Ndimande and Hafejee, the Plaintiff closed its case. The Defendant did not call any witnesses to challenge the testimony of the Plaintiff. The Defendant did not call any witnesses to prove its counter claim.

REASONS FOR JUDGMENT

- [36] Mr De Sai, contended that there was a special plea of jurisdiction which was withdrawn by the Defendant and that the Plaintiff would ask for the costs of withdrawal of the special plea. He furthermore submitted that as the Defendant did not lead evidence on its conditional counter-claim, the counter-claim should either be dismissed or there should be absolution from the instance. I agree with the submission.

- [37] He submitted that the evidence before court showed that the Plaintiff was an agent and also acted as mandatory of the defendant. He argued that the claim before the court rests on the right of the mandatory to be indemnified. He argued that it was not necessary for the plaintiff to produce receipt showing actual payment of costs and disbursements. I do not agree with this submission.
- [38] Mr De Sai furthermore concluded that once there were delays, it must be accepted additional costs at the rate of US\$200 a day for storage and US\$80.00 a day for demurrage. He argued that the demurrage costs were reasonable and that they should be accepted as incurred.
- [39] Mr Segal on behalf of the Defendant argued that it was the Defendant's case that the Plaintiff had to prove that it incurred the costs and additional expenses. He argued that after the testimony of Ndimande and Hafejee, the Court was not placed in a better position to assess whether in fact the costs and expenses as claimed were incurred. There was simply no evidence before Court proving that such costs and expenses were indeed incurred. He further argued that the release of the containers was a demonstration that there was nothing owed by the Defendant. The agreement was that the containers were not to be released if payment had not been made.
- [40] I have considered the evidence by the Plaintiff and the submissions made on its behalf by Mr De Sai. I have also considered the submissions made on behalf of the Defendant by Mr Segal.
- [41] I was referred by Mr De Sai to Sections 33 to 35 of the Civil Proceedings Act 25 of 1965 ("the Act") of importance, in my view, are the provisions of Section 34 of the Act which are as follows:-

"34 Admissibility of documentary evidence as to facts"

41.1. *In any civil proceedings where direct oral evidence of a fact would be admissible, any statement made by a person in a document and tending to establish that fact shall on production of the original document be admissible as evidence of that fact provided:*

- a) *The person who made the statement either:*
 - i. *had personal knowledge of the matters dealt within the statement;*
 - ii. *where the document in question is or forms part of a record purporting to be a continuous record, made the statement (in so far as the matter dealt with therein are not within his personal knowledge) in the performance of a duty to record information supplied to him by a person who had or might reasonably have been supposed to have personal knowledge of these matters; and*
- b) *the person who made the statement is called as a witness in the proceedings unless he is dead or unfit by a reason of his bodily or mental condition to attend as a witness or is outside the Republic, and it is not reasonably practicable to secure his attendance or all reasonable efforts to find him have been made without success”.*

[42] The aim of the sections quoted above is to ensure efficiency in the admission of documentary evidence under certain circumstances. I have considered the production of documents which I am asked to weigh in favour of the Plaintiff. In my view, the production of these documents do not support application of the sections in the said Act. The application of the sections would be of relevance if for instance, a witness whose attendance to Court could not be secured to provide a sworn statement seeking to prove or disprove a fact. None of the documents provided were sworn statements.

[43] In this case, the bone of contention is that the Plaintiff should prove that it incurred the costs and expenses. This contention is supported by the fact that by agreement between the parties, the containers were not to be released if

payment in advance was not made to the Plaintiff. This was, in my view, to ensure the required costs and expenses and the 3% margin charged over the quoted amount would be met when the Plaintiff is called upon by all relevant parties to make payment related to the clearance of the containers in Nigeria.

[44] The Plaintiff has not provided proof that it paid the demurrage and storage charges. Hafejee claimed to have such proof at his home, but it was not made available to this Court. He knew about the trial date four months before trial and proffered no explanation as to why this crucial evidence could not be made available. It was apparent at the close of pleadings that the Plaintiff was required by the Defendant to prove that it paid additional costs and expenses incurred. As a consequence there ought to have been no doubt that the Plaintiff was required to produce the receipt to prove the additional costs and expenses incurred on behalf of the Defendant as this point was pleaded. Failure to provide such proof is, in my view, due to the fact that such proof did not exist. The payment of bribe, which Hafejee claimed was made by Link in Nigeria, was not supported by any document. No witness was called from Nigeria to support the averment. The only document with the semblance of proof of payment was on page 197 of the bundle of documents for the sum of N8 936 810.00(eight million nine hundred and thirty six thousand eight hundred and ten naira). This document has its own challenges as it is not known if the Plaintiff used part of the R3,8 million which was paid to it by the Defendant to make the payment. The further difficulty was that no evidence was presented on what exchange rate was used to convert the Nigerian naira to South African rand and how much of it was in the claim against the Defendant. The court cannot be expected to speculate on the rate of US dollar, Nigerian naira and rand at the time of the alleged payment of the expenses and costs.

[45] I have been referred by Mr Desai on behalf of the Plaintiff to the fact that the Plaintiff was an agent and the mandatory of the Defendant. He submitted that as a mandatory the Plaintiff was entitled to recoup such costs and expenses incurred on behalf of the Defendant. Whilst this may well be so, it is crucial

that such costs and expenses should be proved. I have already made a ruling that the evidence adduced does not prove on a balance of probabilities that such costs and expenses were in fact incurred.

- [46] It was submitted on behalf of the Defendant by Mr Segal that the Court is not empowered to enforce an agreement underpinned by unlawful act such as bribery. The one item on the invoice which is referred to as "facilitation commission" was in fact a bribe. I agree with this submission. In applying this principle, the Supreme Court of Appeal in Extel Industrial (Pty) Ltd and Another v Crown Mills (Pty) Ltd¹

Held that:

".....bribery is a form of corrupt conduct that will not be countenanced by any court of law....It follows that the agreement whereby the bribery was established.... is to be regarded as immoral and thus void. No claim to enforce performance by either of the parties would be entertained".

- [47] It was argued by Mr Segal that the Plaintiff's claim does not pass the test in the proving of the quantum claimed. He contended that no evidence was provided on the exchange rate used in the attempt to claim payment. This submission is in my view, meritorious. The evidence led by the Plaintiff's two witnesses did not assist in resolving resolve the contention.

- [48] There has not been any evidence to prove that the costs and expenses as claimed were in fact paid. The only averment was made by Hafejee that he paid all expenses including bribery but that he could not provide copies of the receipts as they were at his home. It is clear that the containers would not have been released if there was money still owed by the defendant because this was agreed to by the parties. No explanation was offered as to why the containers were released if there was still money owed to the Plaintiff.

¹ 1999(2) SA 719 (A)

- [49] Hafejee has not been able to provide any reason why proof of payment of the costs and expense were never given to the Plaintiff. In my view, these were crucial pieces of documents around which the claim turned. The only inference that should be drawn is that it is unlikely that these documents were ever available.
- [50] I therefore find that the Plaintiff has not been able make a prima facie case to prove its claim.
- [51] I have already found that the Defendant has failed to make a case on its conditional counter-claim.

ORDER

The following order is made:-

- (a) The claim is dismissed with costs
- (b) The plaintiff is absolved from the instance from the conditional counter- claim with costs including the costs of withdrawal of the special plea on jurisdiction.



SENYATSI AJ
ACTING JUDGE OF THE HIGH COURT

DATE OF HEARING:	28/08/2017
DATE OF JUDGMENT:	19/10/2017
COUNSEL FOR APPLICANT:	ADV SEGAL
ATTORNEY FOR THE APPLICANT:	YOUSHA TAYOB ATTORNEYS
COUNSEL FOR THE RESPONDENT:	ADVDE SAI
ATTORNEY FOR THE RESPONDENT:	BEDER FRIEDLAND INC