

NOT REPORTABLE

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

REASONS FOR JUDGMENT

Case No I 3071/2011

In the matter between:

ABSOLUTE LOGISTICS (PTY) LTD

PLAINTIFF

And

ALLIED INVESTMENTS CC t/a CARGO LINE

DEFENDANT

Neutral citation: *Absolute Logistics (Pty) Ltd v Allied Investments CC t-a Cargo Line* (I 3071-2011) [2014] NAHCMD 385 (31 December 2014)

Coram: VON NIEKERK J

Heard: 26, 28, 29 November 2012

Order: 29 November 2012

Reasons: 31 December 2014

Flynote: **Action proceedings** – Claim for payment for services rendered in terms of oral contract – Matter decided on facts only – Judgment given for plaintiff

REASONS FOR JUDGMENT

VON NIEKERK J:

Introduction

[1] The plaintiff instituted action against the defendant by way of simple summons for payment of N\$32 550 plus interest from due date and costs for transport services rendered in terms of an oral agreement.

[2] After a trial in which both parties called witnesses I gave judgment for the plaintiff against the defendant for:

1. Payment of the amount of N\$32 550.00
2. Interest on the aforesaid amount at the rate of 20% per annum, from 1 January 2011 to date of payment.
3. Costs of the action.

What follows are the reasons for this judgment.

The pleadings

[3] At this stage I point out that the plaintiff's declaration contains several references to the year 2011, whereas all the evidence by both parties clearly shows that the applicable year is 2010. What is clearly an error unfortunately escaped the attention of both counsel and the Court. As nothing turns on it and there is clearly no prejudice to the defendant, I shall approach the pleadings as if the references are to the year 2010.

[4] In its declaration, as amended, the plaintiff alleged that the plaintiff, represented by Mr Holger Jensen and the defendant, represented by Mr Harold von Luttichau, entered into an oral agreement during May 2009 in terms of which the following were the material express, alternatively implied, further alternatively tacit terms: (i) the defendant sub-contracted the plaintiff as carrier to collect and convey on the defendant's behalf cargo to and from the Hosea Kutako International Airport (hereinafter 'Hosea Kutako') in Namibia to the OR Tambo International Airport (hereinafter 'OR Tambo') in Johannesburg, South Africa, in terms of a tender agreement between the defendant and Air Namibia; (ii) all cargo to be conveyed by the plaintiff would be identified by Air Namibia and/or its clearing agent; (iii) the defendant undertook (a) to provide the plaintiff at least one week in advance with weekly schedules for all cargo to be conveyed by the plaintiff; (b) to pay the plaintiff an amount of N\$10,800 per consignment; (c) to pay the plaintiff the agreed rate per consignment within 30 days from the date of the plaintiff's statement; (iv) the plaintiff undertook (a) to be at Hosea Kutako by no later than 08h00 on Friday, Saturday, Sunday, Monday, Tuesday and Wednesday to load the cargo; (vii)

(b) to depart from Hosea Kutako by no later than 11h00 on each day that cargo was loaded; (c) to deliver all cargo at Swissport No. 8 or 9 at OR Tambo the next day provided no unforeseen circumstances prevented same; (d) to obtain a signed 'pod' on the defendant's as well as the plaintiff's waybill; (e) to immediately report any delays at the border post to the defendant.

[5] The plaintiff further alleged that when the parties entered into the agreement they did not agree on a fixed term, but it was implicit in the agreement that (i) it would commence on the first date on which the plaintiff collected cargo for and on behalf of the defendant; (ii) it would endure for as long as the defendant's tender agreement with Air Namibia continued, unless terminated by either party on notice, in which event the notice of termination had to be for a valid reason and the notice period for termination had to be reasonable.

[6] It was also alleged (i) that the parties, represented as before, orally amended the terms of the agreement between 20 – 23 September 2010 in that the defendant undertook to henceforth pay the plaintiff N\$9,300 per consignment of cargo conveyed; (ii) that the plaintiff duly complied with all its obligations in terms of the agreement, more particularly in that during the period 7 July 2010 up and until 8 November 2010 the plaintiff duly collected, conveyed and delivered all cargo as agreed and delivered all monthly statements to the defendant; (iii) that as at 15 November 2010 the defendant was indebted to the plaintiff in the sum of N\$32,550; and (iv) that, notwithstanding demand the defendant failed to pay this amount.

[7] The defendant denied certain allegations and also alleged that the agreement between the parties to contain different terms. The defendant alleged, as amplified by further particulars (i) that an oral agreement was entered into between Mr Jensen for the plaintiff and Mr Szacky Nujoma for the defendant for the provision of cargo services on an *ad hoc* basis; (ii) that the plaintiff would only provide the cargo services to the defendant between the two airports if and when requested by Ms Wilna Thomas on behalf of the defendant to do so; (iii) that the defendant would only instruct the plaintiff on specific occasions to collect cargo from the two airports when the defendant had a

shortage of trucks and/or staff to provide the cargo services in terms of the defendant's tender agreement with Air Namibia; (iv) that these instructions would be given by email and by telephone a week in advance and on random days of the week; (v) that during September 2010 the rate for the carriage per consignment was reduced from N\$10,800 to N\$9,300; (vi) that the defendant would pay the plaintiff within 30 days from date of receipt from the plaintiff of proof of delivery and service invoices, as well as confirmation of delivery by Air Namibia; (vii) that the agreement between the parties did not allow for exclusivity of the plaintiff to provide carrier services to the defendant as this was subject to the availability and viability of the plaintiff's vehicles; (viii) that the defendant also employed other carriers to provide the carrier services; (ix) that during the period 7 July 2010 to 8 November 2010 the cargo was not collected solely by the plaintiff, but that the cargo was also collected by another carrier, P Weakley Transport, on instructions of the defendant; (x) that the defendant notified the plaintiff in writing during November 2010 not to collect consignments on behalf of the defendant; (xi) that none of the consignments which make up the amount claimed were carried on instructions of the defendant, but were carried on instructions of Air Namibia; (xii) that the defendant is not indebted to the plaintiff and that it is entitled to refuse to make payment.

[8] During pre-trial proceedings the parties agreed that there are no issues of law to be resolved, but that the following were the issues of fact to be resolved during the trial:

- 1.3 Whether an oral agreement was entered into between Holger Jensen representing the Plaintiff and Szacky Nujoma representing the Defendant for the provision of cargo on an *ad hoc* basis at the Hosea Kutako International Airport and at OR Tambo International Airport when and if requested to do so by the Defendant.
- 1.4 What the express, alternatively implied, in the further alternative, tacit terms of the agreement were.
- 1.5 Whether during the execution of the agreement, more particularly between 20 September 2010 and 23 September 2010 the Plaintiff there and then represented by Holger Jensen And the Defendant, there and then by Harold Arthur von

Luttichau, orally amended the terms of the agreement in terms of which the Defendant undertook to pay Plaintiff an amount of N\$9 300-00 per consignment of cargo conveyed on its behalf.

- 1.6 Whether the Plaintiff duly complied with all its obligations in terms of the agreement.
- 1.7 Whether the Plaintiff during the period of 7 July 2010 up and until 8 November 2010 duly collected, conveyed and delivered all cargo as agreed on the instruction of the Defendant, and duly delivered to the Defendant all monthly statements.
- 1.8 Whether the Defendant was indebted to the Plaintiff at 15 November 2010 in an amount of N\$32 550-00, calculated at the rate of N\$9 300-00 per consignment as per the invoices set out in Plaintiff's particulars of claim.
- 1.9 Whether the Defendant was entitled to refuse to make payment.'

The plaintiff's case

[9] The plaintiff called two witnesses whose testimony is summarized below.

(i) *Holger Jensen*

[10] Mr Jensen is the managing director and a shareholder of the plaintiff. He testified that during 2009 Messrs Nujoma and von Luttichau representing the defendant, which had a contract to transport cargo for Air Namibia from Hosea Kutako to OR Tambo, approached the witness, representing the plaintiff, to transport this cargo at N\$10,800 per consignment, payment to be made within 30 days from rendering of statement.

[11] In the beginning the plaintiff was notified by Ms Wilna Thomas, an employee of the defendant, when to collect cargo. However, she was erratic and often did not do so. The defendant would then be contacted at the last moment by the defendant's clearing agent, Mr Hofni Kanara of Acacia Customs Clearing ('Acacia') and asked where their truck was. In order to streamline the arrangements, a practice developed whereby Mr

Kanara would send an email on behalf of the defendant ordering the plaintiff's services and giving them a few days' notice when to collect cargo. He explained that the plaintiff did not collect all cargo for the defendant, but that the defendant sometimes used its own trucks to do some of the transport. However, as these trucks were smaller than those of the plaintiff, the defendant often could not transport the cargo, which was too big. In practice the defendant's trucks usually transported the smaller consignments to Gaborone, whereas the plaintiff's trucks delivered the larger consignments via Botswana to Swissport at OR Tambo.

[12] After inspection by customs, the signed paper work would be brought back to Namibia by the plaintiff's driver. The plaintiff would then draw up its statement and invoices and deliver same to Ms Thomas. Mr Jensen also prepared a control list of documents delivered, called a cover sheet, as a convenient summary on which Ms Thomas signed as acknowledgment of receipt of the documents after checking them.

[13] During September 2010 Mr von Luttichau telephoned Mr Jensen and stated that he had other transporters who were willing to transport the cargo at N\$9 300 per consignment. They agreed to lower the tariff to this amount.

[14] The witness dealt with several emails sent by Mr Kanara to the plaintiff. In these emails referred to as 'trucking requests', Mr Kanara acted on behalf of the defendant when he indicated that the plaintiff's services would be needed to load consignments of cargo at designated times. These emails were usually sent to the defendant and to Mr Albert Odendaal, the plaintiff's logistics manager. The emails were usually also copied to Mr Szacky Nujoma, Mr von Luttichau and Ms Thomas. Mr Jensen testified that from 16 June 2010 onwards Ms Thomas usually sent the email instruction, but at times there were still instructions from Mr Kanara as well. I pause to note that this evidence is not borne out by the emails which were handed in during the trial and which the defendant did not dispute. These indicate that usually Mr Kanara first sent a trucking request, which was later followed by one by Ms Thomas, although in a different format.

[15] The amount of the plaintiff's claim is set out as follows in the amended declaration:

Invoice No. 046621, collected per AH09463 on 6/11/2010: N\$9,300.00

Invoice No. 046622, collected per AH10966 on 7/11/2010: N\$9,300.00

Invoice No. 046623, collected per AH8537 on 6/11/2010: N\$9,300.00

Invoice NO. 046624, collected per AH10282 on 1/11/2010: N\$9,300.00

Sub-total: N\$37,200.00

Less N\$4,650.00 (included in a part payment of

N\$32,550.00 received on 5/7/2011: N\$4,650.00

Total due: N\$32,550.00

[16] Dealing with this claim in more detail, the evidence shows that at 7:01pm (i.e. 19h01) on 5 November 2010, Mr Kanara sent the plaintiff a trucking request (Exh "A(68)") ordering their services as before for Saturday, 6 November 2010 (two trucks) and for 7, 8, 9 and 10 November 2010 (one truck on each day) at 8h00. This email was not copied to the defendant, but, from evidence later given during the cross-examination of Mr Odendaal, it is clear that 12 minutes before this email, Mr Kanara sent the 'pre-alert' in respect of the very same services to Ms Thomas and copied it to Mr von Lutichau (Exh "D(7)"). In the last paragraph of this email Mr Kanara stated:

'The pre-notification of this program was sent by sms (text) to Wilna as I was driving long distance just for the latter to make pre-arrangement of trucking. The text clearly indicated that the program will be sent by email as usual. We apologise if the text has inconvenient (*sic*) anybody.'

[17] On 8 November 2010 at 9h46 Ms Thomas sent an email to Mr Odendaal (Exh "A"(71)) with the following message: 'As from today we will not make use of your trucking services anymore. Please make sure that you are not sending any trucks to the airport.' However, the cargo always had to be loaded at 8h00. By then the plaintiff had already loaded the cargo at 8h00 as per Mr Kanara's email instruction dated 5 November 2010.

[18] In anticipation of the defendant's case, Mr Jensen testified that Ms Thomas did not orally inform him on 5 November 2010 that the defendant would not be making use of the plaintiff's services any longer. The loading and transport of cargo on behalf of the defendant went ahead as usual on 6 and 7 November 2010 as per the email instruction or Mr Kanara.

[19] The plaintiff made up a set of invoices dated 15 November 2010 and supporting documents for services rendered during the period 1 – 8 November 2010. Invoice 46624 was in respect of cargo picked up on 1 November 2010 and delivered on 3 November 2010; invoice 46623 was in respect of cargo picked up on 6 November 2010 and delivered on 8 November 2010; invoice 46621 was in respect of cargo picked up also on 6 November 2010 and delivered on 8 November 2010 (two trucks were ordered); invoice 46622 was in respect of cargo picked up on 7 November 2010 and delivered on 9 November 2010; and invoice 046610 was in respect of cargo picked up on 8 November 2010 and delivered on 10 November 2010. (Exh "B(1 – 8)"). The plaintiff also drew up the control document or cover sheet as usual (Exh "A"(83)).

[20] Ms Thomas accepted invoices 046621-24 as claimed, but not invoice 046610, which was for the cargo picked up on 8 November 2010. She referred to the fact that the defendant had cancelled the agreement as from 8 November 2010 and she wrote on the cover sheet in respect of this invoice "No pay". Although the plaintiff received this email late, it accepted the cancellation of the agreement and claimed payment for the services rendered in respect of this invoice directly from Air Namibia. Although Ms Thomas accepted the other invoices, the defendant failed to pay them, which was the cause of this action.

[21] Mr Jensen concluded his evidence in chief by stating that, although the parties had initially agreed that Ms Thomas would give the trucking instructions she regularly failed to do so. In practice it was mostly Mr Kanara who gave the trucking requests. There was never any complaint by defendant or refusal to pay for services rendered except with respect to the November 2010 invoices.

[22] During cross-examination Mr Jensen stated that he was not aware that at the beginning of the freight carriage contract with Air Namibia the defendant also had the contract to do customs clearing for Air Namibia, but that it sub-contracted to do this work for them. He was also not aware that at a later stage, i.e. from August 2010, the customs clearing contract was awarded to Nouvelle Management, an entity in which Mr Nujoma was involved, and that Nouvelle also sub-contracted Acacia to perform this task. As far as Mr Jensen was concerned, Acacia appeared to be the defendant's agent or associate throughout. Acacia sent trucking requests to the plaintiff upon which the latter acted by providing the freight carriage in terms of its agreement with the defendant and the defendant paid for the plaintiff's services without any complaint.

[23] Counsel for the defendant confronted Mr Jensen with an email by Mr von Lutichau to Mr Jensen on 20 September 2010 and copied to Ms Thomas (Exh "C(110)"). The subject matter of the email is 'Transport Services – Air Namibia'. The email deals mainly with the dropping of the price per consignment to N\$9 000 (it seems this was eventually settled at N\$9 300). The following paragraph appears in the email: 'Please note that no instructions from Air Namibia staff and others must be acted upon and simply refer them to us in order to avoid what has transpired.....'.

[24] The email does not state what it was that must be 'avoided' or 'what has transpired'. According to instructions put to Mr Jensen, Mr von Lutichau was referring to the problem that, because the plaintiff reacted to Mr Kanara's trucking requests instead of to those of Ms Thomas, the plaintiff's trucks were often already at the airport to collect the cargo when the defendant's own trucks arrived to collect the same cargo on days when the defendant had not ordered the plaintiff's trucks. However, Mr Jensen denied this, but agreed that he was well aware of Mr von Lutichau's request that the plaintiff should not take instructions from 'Air Namibia and others'. However, in his mind, Acacia and Mr Kanara did not form part of 'Air Namibia and others'. As far as he was concerned, they were part of the defendant or were the defendant's associates.

[25] Defendant's counsel further put it to Mr Jensen that the agreement between the plaintiff and the defendant was orally cancelled on 5 November 2010, but this Mr

Jensen denied. He stated that the agreement was cancelled on 8 November 2010. Counsel then put an email dated Sunday, 7 November 2010 written by Mr von Luttichau to him (Exh "C(111)"). It reads as follows:

'Hi Holger,

Reference our last telephone call and the email below.

Despite our formal request that you should not take any instructions from Acacia or Szacky regarding the scheduling of trucks, this instruction has not been adhered to by your company. It is with this in mind and that you informed me of your intension (*sic*) to see my client directly that I am force (*sic*) to look at alternative trucking. We are prepare (*sic*) to review this position, if we are given the guarantee that this is not going to happen in the future.'

[26] Mr Jensen pointed to the fact that this email was sent on Sunday evening at 10:11pm (22h11) and also forwarded by Ms Thomas that same evening at 11:31pm (23h13) when the plaintiff's offices were closed. He said that he only saw this email on Monday morning, 8 November 2010 after the plaintiff's trucks already had collected the cargo at 8h00 as instructed by Mr Kanara in his email of 5 November 2010. Mr Jensen was not questioned further on the contents of this email, which I shall discuss in more detail at a later stage.

[27] Mrs *Williams* pointed to the fact that Mr Kanara's trucking request was forwarded by Mr Odendaal to Ms Thomas on Saturday, 6 November 2010 and put it to Mr Jensen that this was done because the plaintiff did not have instructions from the defendant to collect cargo, that is why the plaintiff deviated from the normal procedure and forwarded this trucking request to the defendant, who had not been copied in by Mr Kanara. Understandably, Mr Jensen could not really reply and suggested that counsel should ask Mr Odendaal about this.

[28] Mrs *Williams* succeeded in showing through various emails that since the 20 September 2010 email by Mr von Luttichau all trucking requests by Mr Kanara were followed by trucking requests given by Ms Thomas for the same dates, except in the

case of 12 and 13 October 2010 (and also 2 and 3 November 2010), as became clear in re-examination. She made the point that the services rendered in respect of these requests were not disputed, but paid by the defendant because it was Ms Thomas who gave the instruction. However, the disputed invoices for services rendered during November 2010 were in respect of trucking requests given only by Mr Kanara. Mr Jensen persisted in his version that Mr Kanara was, in effect, the defendant.

[29] Counsel further put it to Mr Jensen that her instructions were that the cancellation was orally done on 5 November 2010 and later confirmed in writing. When Mr *Erasmus* objected to this, pointing to the fact that these instructions were not in conformity to the defendant's further particulars which state that the cancellation was done in writing with reference to Annexure A which contained an email dated 9 November 2010, Mrs *Williams* applied for leave to amend the further particulars to state that notification of cancellation of the agreement was given orally on 5 November 2010. After Mr *Erasmus* indicated that he had no objection to the amendment, it was granted. Mr Jensen denied that the agreement was orally cancelled on 5 November 2010.

(ii) *Albert Odendaal*

[30] Mr Odendaal, the logistics manager of the plaintiff, was the second and last witness for the plaintiff. He was responsible to send the plaintiff's trucks out to Hosea Kutako in response to trucking requests. According to him, Mr Szacky Nujoma of the defendant brought Mr Kanara to the plaintiff's offices, introduced him and said that he was the person with whom Mr Odendaal must liaise at the airport, as he knows when the loads come in and what the quantities are. Mr Odendaal understood Mr Nujoma and Mr Kanara to be part of the defendant and that Mr Kanara was 'the defendant's man at the airport'.

[31] Mr Odendaal corroborated Mr Jensen in all material respects. He also stated that there was never any complaint since 2009, as far as he was aware, because the plaintiff worked on orders from Mr Kanara. He stated that he was aware of the email of 20 September 2010 requesting the plaintiff not to take instructions from 'Air Namibia and others', but he thought it meant 'Air Namibia and staff'. He never actually saw the email, but he was informed by Mr Jensen about it and that he should not react to trucking requests by Air Namibia. However, as he regarded Mr Kanara and Acacia to be part of the defendant, he just continued as before, regarding Mr Kanara's instructions as emanating from the defendant. The defendant never complained about this.

[32] Mr Odendaal confirmed receiving the trucking request sent by Mr Kanara on Friday 5 November 2010 (Exhibit "A(68)") for the period 6 – 10 November 2010 and made arrangements for trucks to go to the airport as usual. On the morning of 6 November Ms Thomas phoned him and said that she understood that there is a truck of the plaintiff at the airport to collect cargo. Mr Odendaal replied in the affirmative and said that he had received a trucking request. Ms Thomas asked him to forward it to her and Mr von Luttichau and so he did. (This forwarded trucking request was marked Exh "C(111)"). He did not hear from her again on 6 or 7 November 2010. On 6 November 2010 she did not give any indication that the agreement had already been cancelled on 5 November 2010 as alleged by the defendant.

[33] Mr Odendaal executed the trucking instructions for 7 and 8 November as per Mr Kanara's trucking request (Exh "A(68)"). On Monday 8 November 2010 he received Ms Thomas' email of 8 November 2010 (Exh "A(71)") sent at 9h46 stating that the defendant would 'as from today' not be making use of the plaintiff's services any more. By then the plaintiff's truck had already loaded its cargo at the airport at 08h00.

[34] Mr Odendaal gave examples of instances in which trucking instructions were received from Mr Kanara, but not from Ms Thomas, and for which services the plaintiff was paid.

[35] During cross-examination Mr Odendaal acknowledged that he was aware that from August 2010 the defendant would no longer be rendering customs clearing services to Air Namibia, but he said that he understood that Mr Kanara from Acacia would be doing it and he assumed that Mr Kanara was with the defendant.

[36] When asked why it was that Ms Thomas had to send him trucking instructions if he had already received instructions from Acacia, he stated that he was not sure because he was under the impression Acacia and Mr von Luttichau were 'the same company'.

[37] Mrs *Williams* put it to him that her instructions were that Ms Thomas spoke to him on 5 November 2010 by telephone and told him that no further trucks were to be sent to airport, but the witness denied that he spoke to Ms Thomas on the 5th. Counsel further put her instructions that he forwarded Mr Kanara's trucking request of 5 November 2010 to Ms Thomas because he knew that he had not received instructions from Ms Thomas or Mr von Luttichau. Mr Odendaal denied this and testified that he forwarded the trucking request because Ms Thomas had asked him to do so. I pause to note that this version was later confirmed by Ms Thomas, which completely undermines Mrs *Williams*' instructions on the point.

The defendant's case

(i) *Harold von Luttichau*

[38] He testified that he is the 'owner' and 'managing director' of the 'company' (which is actually a close corporation). The defendant started providing services to Air Namibia since 2009 by way of a contract to transport cargo from Hosea Kutako to Johannesburg by road. At first the defendant was contracted to give one stop service namely, customs clearing and bonding services and also the transport. The defendant sub-contracted a clearing agent who in turn sub-contracted Acacia to do the customs clearing part of the contract. Subsequently the other clearing agency left the defendant and then the defendant itself appointed Acacia. The clearing services were stopped in August 2010. Air Namibia then decided to 'source' Acacia directly.

[39] At first the defendant contracted with P Weakley Transport to perform some of the carrier part of the contract, but later towards the end of 2009 the defendant used the plaintiff for bigger loads because the defendant's trucks could only take up to 10 tonnes. The agreement was that plaintiff would provide third party transport as and when required.

[40] Mr von Luttichau testified that he thought that he was present with Ms Thomas and Mr Jensen to explain all the requirements in terms of documentation and procedures to be followed to transport cargo from the airport to South Africa. He stated that Mr Nujoma was not present. In response to a statement that the plaintiff's case was that it had to perform carriage services every day from Friday to Wednesday, he stated that he thought it was as and when there is cargo coming from Frankfurt, so it could be changing by the day. He said that the defendant received 'pre-alerts' from Air Namibia a week in advance and based on that, the defendant would schedule the trucking. Sometimes if there were more passengers, cargo would have to give way and then fewer trucks were required than the defendant initially planned for. The defendant's priority was to first fill the defendant's trucks before filling someone else's trucks. Eventually it came down to getting a 'pre-alert' a week in advance on Friday mornings from Air Namibia and before lunch time the defendant would forward the 'pre-alert' to the third party transporter.

[41] When asked where Acacia fitted into these arrangements, he testified that Acacia had no role to play in the planning, but that the defendant would 'pre-alert' them and the third party transporter. I pause to note that this evidence is not borne out whatsoever by the evidence presented by the plaintiff and by Ms Thomas for the defendant. She testified that Acacia sent weekly 'pre-alerts' and if she did not receive them, she would call Air Namibia. She never testified that the defendant sent 'pre-alerts' to Acacia and no 'pre-alerts' by the defendant were handed in during the trial. The documentation also showed that Acacia's trucking requests were always sent out first and that she usually sent out the defendant's after that. Examples of 'pre-alerts' sent to the defendant by Acacia and copied to Mr Nujoma and various staff members of Air Namibia are Exh

“D(1)” and “D(7)”. The subject matter is ‘ Next Trucking’, commences with the salutation, ‘Dear All’ and states ‘Below kindly take note of our next trucking...’ after which it then sets out the different dates on which trucks are required with a description and weight of the cargo expected to be loaded. In a column the ‘pre-alerts indicate the place of delivery, mostly ‘Swissport’ and in the next column it indicates that the trucking is to be done by the plaintiff. In one instance on each of the ‘pre-alerts’ the place of delivery is indicated as being Gaborone and that the trucking is to be done by the defendant. Ms Thomas later confirmed in her evidence that this is the form in which Acacia’s ‘pre-alerts’ were usually sent to the defendant. I note further that the general import of the ‘pre-alerts’ fit in with the evidence given by both Mr Jensen and Mr von Luttichau about the capacity of the plaintiff’s and the defendant’s trucks and that the plaintiff usually delivered the larger consignments to Swissport whereas the defendant delivered small loads to Gaborone.

[42] According to Mr von Luttichau, he sent out the 20 September 2010 email after a meeting with Air Namibia, also attended by Mr Nujoma of Nouvelle Management. Problems had arisen because Air Namibia had sent out ‘pre-alerts’ to Acacia, Nouvelle’s sub-contractor without sending those ‘pre-alerts’ to the defendant. It then happened that Acacia would give trucking instructions to the plaintiff without the defendant’s knowledge. This sometimes resulted therein that the defendant could not arrange for its own trucks to do the transport, while the plaintiff got all the consignments. Mr von Luttichau also made certain allegations about what seem to be underhand dealings between Nouvelle and the plaintiff, but as these allegations were never put to any of the plaintiff’s witnesses to hear their side of the story, I shall ignore them. In order to avoid the situation as sketched above, Mr von Luttichau informed the plaintiff that it should not react to trucking instructions by ‘Air Namibia and others’, with the intention that ‘others’ should include Nouvelle, and therefore, it seems, Acacia.

[43] According to Mr von Luttichau, he informed Mr Jensen in a telephone conversation on 5 November 2010 that the defendant would no longer need the plaintiff’s services. He testified that he made sure that Ms Thomas also spoke to Mr Jensen on the Friday

about the same issue. He also arranged that P Weakley Transport's trucks be ordered to uplift the cargo at the airport on 6 and 7 November 2010. He later heard that the plaintiff's trucks were at the airport to collect the cargo on 6 November and that P Weakley's trucks also turned up. He testified that, because of these events and in order to confirm the telephone conversation with Mr Jensen on 5 November, he sent Mr Jensen the email quoted above in para. [25] *supra* on Sunday, 7 November 2010, at 10:11pm (22h11) (Exh "C(111)"). He explained that he did this only then because he was out of town over the week-end.

[44] Mr von Luttichau further testified that the defendant refused to pay the plaintiff's invoices for services rendered on 5, 6, and 7 November 2010 because the defendant had 'officially' informed the plaintiff on 5 November 2010 that it no longer needed the plaintiff's services. Mr von Luttichau changed this version towards the end of his examination-in-chief when the following exchanges occurred between him and the defendant's counsel (at Record, p124, line 26 – p126, line18):

'MS WILLIAMS: Now Sir you have indicated earlier that the agreement was cancelled orally on the 5th November 2010, the agreement with the Plaintiff, yes is that correct?"--- What we have done is we have not given them a schedule, we have not asked them or have not requested them to go and collect stuff for us so there was no agreement in place, we just have to call them and say can you please give us this information and can you, do you have trucks available for that date.

Okay --- So what we have done is on the Friday is we told them that we will not require the trucks for (intervention)

Friday is the 5th of November? --- That is it, yes.

Yes. --- So there was no issue of an agreement, we just told them that we will not need the trucks for Saturday, Sunday.

.....

Now if you say that the agreement was already cancelled orally or they were informed that their services are not needed on the 5th of November, why is it then that

this email is then send (*sic*) to say as from today we will not make use of your trucking services anymore? --- As I have stated on the Friday we informed them that we will [not] need their trucks for Saturday, Sunday, so which is then Friday was the 5th of November and cargo was scheduled for the 6th and the 7th which was the Saturday and the Sunday, despite us personally getting involved to inform him that we will now lead [?] and we also not sending them any scheduling of trucks, they choose to turn up on the Saturday, causing us a huge embarrassment while we have scheduled some other trucking company to be there and I then asked Wilna on the Sunday because it just did not happen on the Saturday alone because Saturday it happen, Sunday they turned up as well, I then asked Wilna if you look at the time as she send (*sic*) this email is based on the fact that I insisted that she has to go and put something in writing to tell them that we will no longer make use of their services thereafter so there is a big difference between us informing them not turning up and we informing them formally to say that we will no longer make use of this services (*sic*) as a result of their conduct over the 6th and the 7th of November.'

[45] From this turnabout it is clear that the witness was no longer saying that the defendant already informed the plaintiff on 5 November that it no longer needed its services or that the agreement was cancelled. Moreover, the witness, rather startlingly, denied there being any agreement!

[46] Mr von Luttichau further testified that he then instructed Ms Thomas to send an email stating that the defendant would no longer use the plaintiff's services and he followed this up with the email of 7 November 2010 sent at 10:11pm quoted in para. [25] above.

[47] During cross-examination Mr Erasmus pointed out to Mr von Luttichau that his testimony that Mr Nujoma was not present at the conclusion of the agreement between the parties is contrary to the allegations made on the defendant's plea. To this he gave a confusing response. At first he stated that Mr Nujoma just explained certain things. Later he said that Mr Nujoma just introduced the plaintiff to him. However, he acknowledged that Mr Nujoma was part and parcel of the defendant's team. He further

acknowledged that he did not know about the meeting between Messrs Nujoma, Kanara and Odendaal. He therefore could not deny that it took place.

[48] In spite of all the evidence to the contrary, the witness also blew hot and cold about whether there was an agreement between the plaintiff and the defendant.

[49] Under cross-examination he agreed that in the beginning Acacia was contracted by the defendant to do customs clearing and scheduling of trucks and that Acacia was “part of you”, but he pointed out that this was the situation prior to August 2010. He also stated that Mr Kanara first had to have his trucking requests checked by Ms Thomas, but that Mr Kanara constantly breached this requirement. However, Mr von Luttichau was not able to indicate any correspondence to show that this was ever taken up with Acacia or Mr Kanara with or without the knowledge of the plaintiff.

[50] Mr *Erasmus* put it to Mr von Luttichau that whether Mr Kanara was authorised by the defendant or not, he gave trucking requests and that the impression was created that he was allowed to do so and that the defendant substantiated that impression by paying the plaintiff at the end of the month. Mr von Luttichau replied that the defendant substantiated the impression by giving its own instructions to the plaintiff in all cases, but he could not substantiate this testimony in evidence by reference to documents before the Court.

[51] Mr *Erasmus*, by referring to the documents in Exhibit A, was able to demonstrate that a certain procedure was followed by the parties and allowed by Mr von Luttichau, namely, Mr Kanara would send a trucking request, the plaintiff would do execute it and be paid, Ms Thomas would send trucking requests, the plaintiff would execute them and be paid. Mr von Luttichau denied this, stating that the procedure is not based thereon that if there is a ‘pre-alert’, the defendant would pay the plaintiff, but that the defendant based payment on the service delivered with proof of an invoice, a delivery note, and a SAD 500 form. However, it seems to me that this evidence does not assist the defendant, because it is precisely the plaintiff’s case that this documentation was indeed

provided to the defendant in respect of all the plaintiff's invoices, including those that the defendant disputed.

[52] The plaintiff's counsel questioned Mr von Luttichau about the conflicting instructions he gave to his lawyers for purposes of providing further particulars. In this regard reference was made to annexure A to the defendant's further particulars. From this annexure it is clear that the defendant sent an email to the plaintiff on 9 November 2010 in which it is clearly stated that the 'relationship' between the parties was terminated with effect from Monday 8 November 2010. However, during the trial this was amended on instructions to indicate that the agreement was cancelled orally on 5 November 2010, just to be contradicted again during Mr von Luttichau's testimony when he stated that on 5 November the defendant only indicated that it did not require the plaintiff's services on 6 and 6 November. What is clear from his answers is that he gave all these instructions, but provided no explanation why they conflicted.

[53] He also did not provide a satisfactory answer why there was no reference in any of the emails subsequent to 5 November 2010 to the fact that the plaintiff was notified on the said date that its services were either cancelled or not required.

Wilna Thomas

[54] Ms Thomas told the Court that she was the administration officer of the defendant. She was responsible to inform the plaintiff every Friday after having received the 'pre-alert' from Acacia or Air Namibia about the trucking schedule for the following week. Normally Acacia was supposed to send the 'pre-alert' only to the defendant, but if they sent it on a Friday the plaintiff was copied. She testified that she would ask the plaintiff in her trucking requests to send the driver's details directly to Acacia so that Acacia could do the 'pre-alert' early. This evidence clearly makes no sense because the 'pre-alert' precedes the request for driver's details. It seems what the witness meant was that the paper work could be processed quickly so that there would be no delays when the trucks came to load the cargo, as she also testified at a later stage. She further testified that if she did not receive any 'pre-alerts' on a Friday morning she would

telephone Air Namibia herself to find out what the position was and she would then send an email to the plaintiff with a trucking request. Even if Acacia sent the trucking request through, it was her responsibility to send the trucking request to the plaintiff.

[55] When asked what would happen if the plaintiff sent trucks on an Acacia trucking request which she did not also send, she said that the defendant would not pay the plaintiff. She said that although Acacia sent trucking requests on 12 and 13 October 2010 and on 2 and 3 November 2010, she did not because there were no flights. However, in cross-examination she was not able to dispute evidence given previously by Mr Odendaal that the plaintiff was paid for 12 and 13 October 2010's transport. What is more, there is documentary proof (Exh "D(6)" and Exh "A(84)") that the plaintiff did load cargo on 3 November 2010 which means that there was indeed a flight on that day, as Ms Thomas conceded during cross-examination.

[56] In regard to Exhibit "C(111)", the trucking request of 5 November 2010 by Acacia to the plaintiff which was forwarded by Mr Odendaal to her on 6 November 2010, she testified as follows. Early on 6 November 2010 Mr von Luttichau telephoned her to ask what happened at the airport that both P Weakley Transport's and the plaintiff's trucks were there to collect cargo. She called Mr Odendaal to find out because she did not send him a trucking request for 6 November 2010. Mr Odendaal said he got an email from Acacia on 5 November 2010. She asked Mr Odendaal to email her that request. (I pause to note that her evidence about this is the same as that of Mr Odendaal). She then called Mr Stephan Marcuzi of the plaintiff, as well as Mr Jensen, and Mr von Luttichau also called them and informed them that the defendant is not making use of their service anymore and asked why they were at the airport. She did not testify what Messrs Marcuzi and Jensen replied.

[57] On 7 November 2010 she learnt that both trucking companies were at the airport again to load cargo. She did not state how she obtained this information. Mr von Luttichau then asked her to send an email to the plaintiff, which stated that 'from today we will not make use of your services anymore'. She then sent an email on Sunday 7 November 2010 at 9:47pm (21h47) (see Exh "C(107)") in which she stated that 'as from

today we will not make use of your trucking services anymore. Please make sure that you are not sending any trucks to the airport', (which reached the plaintiff too late to stop its trucks). As I understand it, she learnt on Monday morning, 8 November 2010 that the plaintiff's trucks were again at the airport to load cargo, whereupon she sent an email at 9:46am with the same wording as the one of the previous evening (Exh "A(71)"). When the defendant's counsel asked her why she said 'from today', she answered that it was 'maybe a mistake from my side because I already spoke to Stephan and Holger Jensen on the 6th. That is why I send (*sic*) that email on the Sunday because I spoke already informed them telephonically.' This answer does not make sense, because, firstly, the email in no manner refers to any earlier conversation and secondly, it also does not follow logically that she would state 'as from today' if she had indeed already informed them on an earlier occasion. Indeed, under cross-examination Ms Thomas realised that her answer does not make sense, because she then replied that she had no answer for why she wrote as she did.

[58] When it was put to her that she had no conversation with either Mr Jensen or Mr Marcuzi, she answered by way of a counter-question, namely what was P Weakley doing at the airport? She was suggesting, it seems, that she would not have arranged for P Weakley's trucks to come if she had not cancelled the plaintiff's services orally. Mr Erasmus then suggested to her that the defendant's house was not in order, implying that she had not done her work properly as he had also put to her earlier, which she denied. However, I also had the independent impression that it might have been the case that she had not followed Mr von Luttichau's instructions to inform Mr Jensen orally not to send trucks on the Saturday and Sunday, or that she had, wrongly, thought that it would be sufficient merely not to send a trucking request to the plaintiff.

[59] When she was asked by defendant's counsel on which date she had informed Messrs Jensen and Marcuzi telephonically, she suddenly indicated for the first time that it happened on both 5 and 6 November 2010. She then repeatedly testified that she and Mr von Luttichau called on 5 November 2010 and that she called both Messrs Marcuzi and Jensen on 6 November 2010 to state that the plaintiff's services were no

longer needed. If this were indeed so, it becomes even stranger why she stated in two emails, the one on 7 November and the other on 8 November, that 'as from today' the defendant would no longer need the plaintiff's services.

[60] Exh "D(1)", a 'pre-alert' dated 30 October 2010 by Mr Kanara and addressed, inter alia, to Ms Thomas and copied, inter alia, to Mr Nujoma and Mr von Luttichau was shown to the witness. This email is in the same format as the email sent to her by Mr Kanara on 5 November 2010 (Exh "D(7)"). When asked to comment about the fact that the plaintiff is indicated in certain instances as the carrier, Ms Thomas stated that Mr Kanara used to do it in this way and that the defendant had a problem with this. She stated that the defendant had sent emails to Mr Kanara complaining about this, but, as Mr *Erasmus* succeeded in showing during cross-examination, none of these were discovered or proved as one would have expected the defendant to have done.

[61] As far as Mr Kanara's 'pre-alert' of 5 November 2010 (Exh "D(7)") is concerned, she testified that she did not receive the sms mentioned in the last paragraph and that she only saw the 'pre-alert' the next day. I must say that I find this evidence improbable, because Ms Thomas testified that she arranged for P Weakley's Trucks to be at the airport on 6, 7 and 8 November 2010. She must have received some pre-notification to have known what arrangements to make.

[62] She testified that on 5 November Mr von Luttichau informed her in person that the defendant would not make use of the plaintiff's trucks anymore and that she must arrange with P Weakley to collect the cargo. She made this arrangement and deliberately did not send a trucking request to the plaintiff.

[63] As far as her signature on the plaintiff's document control sheet or cover sheet is concerned, she testified that she did not check the documents, but only signed for their receipt. She repeatedly denied Mr Jensen's testimony that she usually checked the documentation and that she also did so in respect of the last cover sheet which listed the disputed invoices. She stated that they were usually in a hurry and that there was no time to check the documents. She stated that she just saw the invoice for the cargo

loaded on 8 November 2010 by chance because it was the first document attached to the list and she rejected it because of the email she sent on 8 November 2010 stating that the defendant would no longer be making use of the plaintiff's services.

[64] I pause at this stage to note that her version that she just signed for receipt without checking the documentation was never put to Mr Jensen during cross-examination. Furthermore, I find it improbable that she would not have checked at least the last set of documents delivered to her on or about 17 November 2010, because of what had transpired between the parties and because the agreement had been cancelled. She was then aware that, according to her, the plaintiff had in the past performed trucking services which she had not authorised. It is probable that she would have been on the alert to check that the invoices were not in respect of these services. If I accept for the moment that she rejected the first invoice after she noticed it by chance, it is all the more probable that, having noticed and rejected it, she would have made sure that the remainder of the invoices were for services which were either authorised or performed prior to the cancellation of the agreement. In this context it is also important to note that Ms Thomas during cross-examination stated that she had no answer to explain why she did not reject all the other invoices after having rejected the one for 8 November 2010's services.

[65] She further testified that she later checked all the documents and compared their dates with the email trucking requests and then prepared the documents to invoice Air Namibia. It was then that Mr von Luttichau came to her and said that the defendant is not supposed to pay the invoices for the services of 6 and 7 November 2010 because P Weakley's trucks were also at the airport. This clearly shows that, as far as Ms Thomas was concerned, until Mr von Luttichau raised the matter with her, she dealt with the documentation on the basis of Mr Kanara's trucking request without there being a request by her and that she was, in effect prepared to invoice Air Namibia on the basis that the defendant would be paying the plaintiff for their 'unauthorised' services.

[66] What also became evident is that, in spite of Mr von Luttichau's excuse that the defendant could not send earlier emails about the alleged conversations that took place

on Friday 5 November 2010 because the defendant does not work on week-ends, Ms Thomas contacted Mr Odendaal on Saturday 6 November; she received the forwarded trucking request; she sent an email to Mr Odendaal on Sunday morning 7 November 2010 at 10:30 that the plaintiff should prepare all its outstanding invoices by Monday for payment by Tuesday (see Exh "A(70)"); and sent the Sunday evening email about not using their services any longer 'as from today'.

Evaluation

[67] The witnesses for the plaintiff generally made a favourable impression on me. A slight criticism may be made of Mr Odendaal's testimony that he interpreted the reference to 'Air Namibia and other' in the email of 20 September 2010 to mean 'Air Namibia and staff'. This does not make sense, as 'Air Namibia' in itself would include its staff. However, it should be borne in mind that Mr Odendaal never actually saw the email before until the trial. He was only told about it by Mr Jensen, who instructed him not to take trucking instructions from 'Air Namibia'.

[68] Mr von Luttichau regrettably did not impress me as a witness. He often evaded questions by giving long irrelevant answers. His evidence was contradictory in certain respects and at times deviated from his earlier instructions to counsel, some of which were set in the pleadings. He did not answer simple questions by giving a clear and straight answer, e.g. when the plaintiff's counsel asked him whether the defendant had already been paid by Air Namibia for the disputed invoices, he at first denied it, while he very well knew that payment had taken place, whether by actual payment or by set-off, as he eventually conceded.

[69] During cross-examination Mr von Luttichau conceded that the defendant is indebted to the plaintiff in respect of one of the invoices claimed, namely invoice no. 046624 for the services rendered by the plaintiff on 1 November 2010. He indicated that he was already aware of this before the commencement of the trial, yet the invoice remained unpaid. This did not make a good impression on me about his *bona fides*.

[70] When Mr von Luttichau was asked in cross-examination whether the defendant disputes that the cargo mentioned in the disputed invoices was in fact transported by the plaintiff's two trucks on 6 November 2010 and by one truck on 7 November 2010, his answer was again evasive in nature. Instead of saying 'no', as one might expect, he stated that the plaintiff took the cargo without the defendant's authority and while the defendant had other transporters waiting to transport the same cargo. He alluded thereto that the defendant had to pay these other transporters, but after wasting further time with evasiveness, he was eventually constrained to concede that the defendant did not pay them anything.

[71] Ultimately it became clear, even if it might be said that that the plaintiff rendered the services without authorisation by the defendant (a contention with which I shall deal later), that the plaintiff in fact did the work, that the defendant did not pay any other transporter, and that the defendant claimed and was paid for the work done by the plaintiff, but refused to pay the plaintiff. This approach, steered by Mr von Luttichau, similarly did not make a good impression on me.

[72] Ms Thomas seemed at first very nervous, although she gained more confidence the longer she remained in the witness box. Nevertheless, I had the impression at times that she felt under pressure to give a certain version to the Court. I am not sure whether she was trying too hard to defend herself against counsel's charge in cross-examination that she did not always do her work as she was supposed to, or whether there were in fact instances that she had not followed Mr von Luttichau's instructions for which she was trying to cover up. The fact is that some of her answers on crucial aspects simply did not make sense. Even she was constrained on more than one occasion, when the plaintiff's counsel confronted her with the inherent improbabilities of her version, to state that she had no answer to explain them.

[73] On the available evidence it is quite clear that, although the agreement between the parties may have been of an *ad hoc* nature in the beginning, it settled into a routine of more or less weekly trucking 'pre-alerts' being given by Mr Kanara of Acacia, which included trucking planning to convey the cargo indicated. This included an indication by

Mr Kanara of which loads would be transported by the plaintiff and which loads would be transported by the defendant. Trucking was usually required for every day of the week from Saturdays to Wednesdays. Following upon the weekly 'pre-alert', Mr Kanara came to issue trucking requests to the plaintiff because Ms Thomas' trucking requests were initially irregular, although the situation improved at a later stage. It is clear that the defendant knew that Mr Kanara was issuing trucking requests to the plaintiff and that it did nothing to counter this. If the intention was that the plaintiff should act only upon Ms Thomas' instructions and not on those of Acacia, this was not made clear to the plaintiff on the available evidence before me.

[74] The evidence by the defendant's witnesses that the defendant only paid for consignments carried on its own instructions, is not supported by other more credible or probable evidence. In this regard I refer to the trucking done on 12 and 13 October 2010 which was already discussed earlier in these reasons; and also to the fact that Ms Thomas was quite prepared to accept the invoices for services rendered on 6 and 7 November 2010 and for which only Acacia had sent a trucking request.

[75] From the available evidence it is clear that Acacia and Mr Kanara were indeed part of the defendant's 'team', as it was described, at the very least until August 2010. When Acacia was no longer the defendant's sub-contractor, it was appointed by Air Namibia. However, practically speaking, the flow of emails and trucking requests continued as before. There is no evidence that the defendant conveyed the change in their relationship to the plaintiff. As far as the plaintiff was concerned, it was business as usual.

[76] Mr von Luttichau made much of the 20 September 2010 email, but I do not think that the plaintiff can be blamed for not understanding that by 'Air Namibia and others', Mr von Luttichau also meant Acacia and Mr Kanara. This was certainly not explained in the email. The first and only indication that the plaintiff was told not to accept instructions from Acacia was when Mr von Luttichau stated in his email of Sunday 7 November 2010 sent at 10:11pm (Exh "C(111)") to Mr Jensen, 'Despite our formal request that you should not take any instructions from Acacia or Szacky regarding the

scheduling of trucks, this instruction has not been adhered to by your company.....'. When Mr von Luttichau explained this statement, he did so with reference to the 20 September 2010 email, conveying that the so-called 'formal request' was the one about not taking instructions from 'Air Namibia and others'. As I have stated before, the email of 20 September does not make this clear at all.

[77] In my view the defendant must take responsibility for not making it clear to the plaintiff earlier on that Acacia and Mr Kanara had no authority to give trucking instructions and that, if acted upon, such services would not be paid for.

[78] Clearly the agreement between the parties was only cancelled with effect from 8 November 2010 in spite of what Ms Thomas testified. This much was stated in so many words by Mr von Luttichau in his later evidence and this is confirmed by the defendant's emails on the subject.

[79] On the probabilities I also do not accept that Ms Thomas and/or Mr von Luttichau orally informed the plaintiff on 5 and/or 6 November that its services were not required for the Saturday and Sunday. If they had done so, the probabilities are overwhelming that either or both of them would have stated as much in their subsequent emails, which they did not. The sole reference to 'our last telephone call' in Mr von Luttichau's email of 7 November 2010 to Mr Jensen (Exh "C(111)") does not specify a date when it took place. Furthermore, when the contents of the email are considered, the telephone call appears to have concerned a topic other than Mr von Luttichau conveying that the plaintiff's services were not needed for the week-end. I further note that it was not put in cross-examination to Mr Jensen that Ms Thomas made such calls to him.

[80] In my view the plaintiff succeeded in proving its case on a balance of probabilities. Plaintiff's counsel submitted that the evidence indicated that the due date for payment of the disputed invoices was 1 January 2011. I therefore made the order as indicated in paragraph [2] of these reasons.

____(Signed on the original)_____

K von Niekerk

APPEARANCE

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