

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK
RULING

Case Title: Juanita Liani Viviers t/a LFS Logistics and Plastic Packaging (Pty) Ltd	Plaintiff Defendant	Case No: HC-MD-CIV-ACT-CON-2020/03752	Division of Court: Main Division	Heard on: 04 April 2022
Heard before: Honourable Mr. Justice Usiku, J		Delivered on: 05 April 2022		
Neutral citation: <i>Juanita Liani Viviers t/a LFS Logistics v Plastic Packaging (Pty) Ltd</i> (HC-MD-CIV-ACT-CON-2020/03752) [2022] NAHCMD 170 (05 April 2022)				
Order: 1. The onus of adducing evidence lies on the plaintiff, and as such, the plaintiff has an obligation to adduce evidence first. 2. The plaintiff pays the costs of the defendant occasioned by the application for the determination of the above issue.				
Reasons for order:				
USIKU, J: <u>Introduction</u> [1] This is an application, in terms of rule 99(3), by the plaintiff for a ruling that the defendant has an obligation to adduce evidence first.				

[2] The plaintiff's above application is founded on the admissions made by the defendant in its plea and in the pre-trial order. The plaintiff submits that, the defendant admits it concluded an oral agreement for the provision of transport services, by the plaintiff to the defendant, upon request from time to time at the fee structure applicable from time to time. In addition, the plaintiff contends that, the defendant admits that the actual weight and size of the consignment would be determined by the transporter, instructed by the plaintiff to transport the relevant consignment and that this would be accepted by the parties.

[3] The defendant also admits that on or about the 3rd and on or about the 10th of February 2020, the defendant requested urgent overnight road transport for 359 and 262 boxes, respectively, from Paarl, Cape Town, to Keetmanshoop. The defendant admits that the plaintiff rendered invoices in respect of services rendered on the dates and in the amounts set out in the particulars of claim, and that the plaintiff collected the shipments on the dates and in quantities set out in the particulars of claim.

[4] The plaintiff, therefore, submits that on account of the admissions made, the defendant has a duty to begin leading evidence first.

[5] The application by the plaintiff is opposed by the defendant. The defendant contends that the plaintiff claims payments of amount based on a fee structure. The defendant denies that the fee structure alleged was part of the agreement. The defendant further contends that it has not raised a special plea to attract an *onus* to start.

Analysis

[6] As a general rule, a plaintiff is obliged to adduce evidence first, because the overall onus rests on him/her to prove his/her case on the balance of probabilities. However, in certain instances, for example where a plea of 'confession and avoidance' is made, a defendant bears the evidentiary burden and may be directed to give evidence first, to combat a *prima facie* case made by the plaintiff.

[7] It is common cause that in the present case, the defendant has made the admissions referred to by the plaintiff. For example, the defendant, admits that oral agreement for the provision by the plaintiff of logistics and transport services to the defendant, upon request from

time to time at a fee structure applicable from time to time, existed between the parties.

[8] However, the pleadings also show that the defendant denies that the fee structure alleged by the plaintiff to be the applicable fee structure, was the applicable fee structure pertaining to the parties' agreement.

[9] In addition, the defendant denies that the transport services it required from the plaintiff on the 3rd and 10th February 2020, was made on the basis of the fee structure as set out in para 5 of the particulars of claim and denies that the plaintiff carried out all her obligations in terms of the agreement.

[10] It is also common cause that the defendant admits that the parties agreed that the actual weight and size of the consignment would be determined by the transporter instructed by the plaintiff to transport the relevant consignment and that this would be accepted by the parties. However, the foregoing admission does not include an admission that the weight and size of the consignment in question was actually determined by the relevant transporter.

[11] Having examined the admissions made in the pleadings, I am not persuaded that such admissions warrant placing evidential burden on the defendant, to adduce evidence first.

[12] I am of the opinion that the onus of adducing evidence lies on the plaintiff to prove the agreement, the terms thereof, the breach, and her entitlement to the relief she claims, insofar as same is not admitted by the defendant. Having had regard to the pleadings, I rule that the duty to begin to adduce evidence first lies on the plaintiff.

[13] In the result, I make the following order:

1. The onus of adducing evidence lies on the plaintiff, and as such, the plaintiff has an obligation to adduce evidence first.
2. The plaintiff pays the costs of the defendant occasioned by the application for the determination of the above issue.

Judge's signature

Note to the parties:

B Usiku Judge	Not applicable
Counsel:	
Plaintiff:	Defendant:
J Diedericks Instructed by Viljoen & Associates Windhoek	G Dicks Instructed by Ellis & Partners Legal Practitioners Windhoek