

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: HC-MD-CIV-ACT-CON-2021/01971

In the matter between:

**SUPER GAME DEALERS CC**

**PLAINTIFF**

and

**FYSAL FRESH PRODUCE (PTY) LTD**

**1<sup>ST</sup> DEFENDANT**

**FYSAL BRENNER**

**2<sup>ND</sup>**

**DEFENDANT**

**Neutral citation:** *Super Game Dealers CC v Fysal Fresh Produce (Pty) Ltd* (HC-MD-CIV-ACT-CON-2021/01971) [2023] NAHCMD 234 (12 May 2023)

**Coram:** NDAUENDAPO J

**Heard:** 25 October 2022

**Order:** 28 April 2023

**Reasons:** 15 May 2023

**Flynote:** Carrier — Carriage of goods — Contract one of *locatio conductio operis* — Onus on carrier to prove it conveyed goods without damage - where goods are damaged carrier not normally entitled to remuneration. Goods damaged whilst in the care of plaintiff, plaintiff not entitled to remuneration. Counterclaim for payment of damaged goods — Defendants failed to prove market value of the goods.

**Summary:** The plaintiff instituted action against the defendants claiming an amount of N\$45 000 for, *inter alia*, transport services rendered by the plaintiff to the defendants for transporting a freight of onions from Piketberg, Western Cape to Santa Clara in Angola. The defendants refused to pay on the basis that the onions got wet in transit and the purchaser refused to accept the onions. The defendants submitted that it was a term of the agreement that the plaintiff will secure the onions in such a way that they are not exposed to the natural elements such as rain. They submitted that the plaintiff breached that agreement in that the freight of onions was exposed to rain and they got bad/rotten and the purchaser refused to accept the onions. The defendants filed a counterclaim, claiming an amount of N\$135 000 for the damaged onions. The plaintiff refused to pay on the basis that it is not liable for the damage caused to the onions.

*Held:* that it was a term of the agreement that the plaintiff would ensure that the freight of onions would be stored or secured in such a way that they will not be exposed to rain and that the plaintiff breached the agreement in that the onions got wet from the rain water that entered the truck.

*Held further:* that as a result of the onions getting wet, the purchaser had every right to refuse to accept the onions.

*Held further:* that as far as the counterclaim is concerned, the defendants failed to adduce evidence to prove the market value of the onions.

*Held further:* that the plaintiff's claims and the counterclaim are dismissed and there is no order as to costs.

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**ORDER**

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1. The plaintiff's claims are dismissed.
2. The defendants' counterclaim is dismissed.
3. There is no order as to costs.
4. The matter is removed from the roll and regarded as finalized.

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**JUDGMENT**

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**NDAUENDAPO J:**Introduction

[1] This action concerns a claim for payment (for breach of contract) in the amount of N\$45 000, for *inter alia*, transport services rendered by the plaintiff to the defendants in terms of an oral agreement, which amount the defendants refused to pay.

Parties

[2] The Plaintiff is Super Game Dealers CC a close corporation duly registered as such in terms of the applicable laws in the Republic of Namibia with its principal place of business situated at Farm Hoffnung No 66, District of Windhoek, Republic of Namibia.

[3] The First Defendant is Fysal Fresh Produce (Pty) Ltd a private company with limited liability duly incorporated as such in terms of the applicable laws in the Republic of Namibia with its principal place of business situated at Oshakati Main Road, Oshakati, Republic of Namibia.

[4] The second defendant is Fyssal Brenner an adult businessman with his place of business at Oshakati main road, Oshakati, Namibia.

### Pleadings

[5] The plaintiff alleges that during March 2021 and at Windhoek, the plaintiff, represented by Mr Jan Blaauw, duly authorised thereto, and the defendant, represented by Mr Abbas Fysal, duly authorised thereto, entered into an oral agreement in terms of which it was agreed that the plaintiff would render transport services to the defendant from Cape Town, South Africa, to Santa Clara, Angola returning to Windhoek, Namibia.

[6] The express, alternatively implied, in the further alternative tacit terms of the oral agreement between the parties were, *inter alia*, the following:

6.1 The Plaintiff would render transport services to the First, alternatively Second Defendant in respect of a freight of onions from Cape Town, South Africa, to the Oshikango border post between Namibia and Angola;

6.2 The First, alternatively Second Defendant would provide a driver to transport the Plaintiff's truck across the Oshikango border post into Angola where the freight transported by the Plaintiff would be offloaded at the Santa Clara border post;

6.3 The turn-around time for the off-loading of the freight of onions in Angola would be approximately two days per freight;

6.4 The Plaintiff would charge the First, alternatively Second Defendant a transport fee of N\$45 000 for the transport services rendered from Cape Town, South Africa, to the Oshikango, Namibia;

6.5 The Plaintiff would issue invoices to the First, alternatively Second Defendant in respect of the transport services so rendered, which invoices would be payable by the Defendants upon receipt thereof.'

### AD Claim 1

[7] The plaintiff successfully rendered the transport services to the defendants' in that its truck departed from Cape Town, South Africa, on 25 March 2021 en-route to Oshikango. The plaintiff's truck arrived at the Oshikango border post on 28 March 2021 and was transported across the border to Santa Clara by the defendants' driver on 29 March 2021 in order for the freight to be off-loaded.

[8] In the premise, the plaintiff became entitled to payment in the amount of N\$45 000, but despite demand the defendants' refused to pay.

### AD Claim 2

[9] The plaintiff further alleges that it was at all relevant times within the contemplation of the parties that should the plaintiff's truck be delayed for any reason not attributable to the plaintiff, the plaintiff would suffer losses due to its inability to use its truck. In such circumstances the first, alternatively second defendant would be liable for the payment of daily standing fees to the plaintiff at a market related rate.

[10] The freight of onions was not off loaded at Santa Clara by the defendants' within the aforesaid two days. On 1 April 2021 the plaintiff's truck returned to Namibia without the freight having been off loaded, allegedly due to the client refusing to accept delivery of the onions.

[11] Due to the plaintiff's truck returning to Namibia with the freight of onions on the day prior to Easter weekend, the plaintiff's truck remained at the Oshikango border post until 6 April 2021 in order for customs related issues to be sorted.

[12] The plaintiff's truck was thereafter kept at the first, alternatively second defendant's property at Oshikango. The plaintiff was subsequently advised by the first,

alternatively second defendant that its truck should return to Windhoek with the freight of onions.

[13] Due to the aforesaid:

13.1 The plaintiff was required to pay for accommodation for its driver for a period of 4 nights at a rate of N\$460 per night, totalling N\$1 840 (including VAT);

13.2 The plaintiff's truck remained standing for a total of 8 days. The fair and reasonable industry-related standard daily standing fees amount to N\$3 450. In the premises the total standing fees incurred due to the Plaintiff's truck standing at the Oshikango border post amounted to N\$27 600 (including VAT);

13.3 The plaintiff was required to transport the freight of onions from Oshikango to Windhoek, whereas under normal circumstances the plaintiff would not have transported the freight to Windhoek. The fair and reasonable transport costs associated with transporting a freight from Oshikango to Windhoek amounts to N\$15 000.

[14] As a result of the aforementioned, the plaintiff suffered damages due to the first, alternatively second defendant's aforesaid actions in the amount of N\$44 440.

#### Defendants' plea

[15] The defendants' denied that a legal entity by the name of Fysal fresh produce (Pty) Ltd is duly incorporated in terms of the applicable laws in the Republic of Namibia and/or that such a legal entity exists.

[16] The turn-around time for the off-loading of the freight of onions at the Santa Clara Multipark was dependent on the time that the truck would arrive and could take between one and two days.

[17] The defendants' pleaded that there was further material express, alternatively implied, in the further alternative tacit terms and conditions of the agreement. These terms were as follows:

'17.1 The freight of onions had to be delivered within three days to the Santa Clara Multipark from the date of its collection in Cape Town, South Africa;

17.2 The freight of onions had to be stored in such a manner on the truck that the load would not go bad or become damaged during a three day trip;

17.3 The freights of onions had to be stored in such a manner on the truck that the load would not be exposed to the natural elements that would result in the freight going bad or becoming damaged;

17.4 The Plaintiff's truck driver would require a valid covid-19 test in order to allow him to enter Angola and drive to the Santa Clara Multipark; and

17.5 Should the freight of onions not be accepted by the client due to the fault of Plaintiff, the Defendants' would be entitled to damages from the Plaintiff and the Defendants' would not pay for the delivery of the freight on onions.'

[18] The defendants further pleaded that, at the time the agreement was concluded, the plaintiff was aware of the following facts, and the agreement was entered into on the basis of these facts:

'18.1 If the freight of onions was not delivered within the specified time, the freight would go bad, and the client would not accept the freight of onions;

18.2 If the freight of onions was not properly stored during the transportation by the Plaintiff, the onions would go bad, and the client would not accept the freight of onions;

18.3 If the freight of onions was not properly stored during the transportation by the Plaintiff and be exposed to the natural elements, which resulted in the onions going bad or being damaged, the client would not accept the freight of onions; and

18.4 If the freight of onions went bad and, as a direct result of the onions going bad, the clients refuses to accept delivery thereof, the Defendants' would suffer losses in the amount of N\$135 300, being the purchase price the client would pay for the delivery of the onions.'

[19] At all times relevant hereto the plaintiff publicly portrait itself to be an expert in the transportation of perishable goods.

[20] In the premise, the agreement between the parties contained an implied warranty against any latent defects and/or faults and/or breaches, which would render the freight of onions unfit for delivery to the client.

[21] The second defendant duly complied with his obligations in terms of the agreement.

[22] Despite this, and, in a material breach of the agreement, the plaintiff breached the agreement in that it, *inter alia*, the plaintiff:

'22.1 Collected the freight of onions of the 17<sup>th</sup> day of March 2021; and/or

22.1 Delivered the freight of onions to the Namibia/Angola boarder on the 28<sup>th</sup> day of March 2021;

22.2 Failed and/or neglected and/or refused to transport the freight of onions in such a manner as to ensure that the freight would not perish and/or go bad and/or get damaged



in that the freight of onions was exposed to rain and, as a direct result of the rain, became wet and started to mold, thereby going bad.'

[23] As a direct result of the abovementioned breaches, the defendants refused to accept delivery of the freight of onions, and they were damaged to such an extent that they were not fit for human consumption.

#### Counterclaim

[24] As a result of the plaintiff's breach, the second defendant suffered damages in the amount of N\$135 300, being the value of the freight of onions that the second defendant would have been paid by the client had the plaintiff not breached the agreement.

[25] In the premises, the plaintiff is liable to the second defendant in the amount N\$135 300, being the damages suffered by the second defendant due to the plaintiff's breach as set out hereinabove and, which amount is due, owing and payable to the second defendant.

#### Plea to counterclaim

[26] The plaintiff pleaded that there was no agreement that the freight of onions would be transported at the plaintiff's risk. Plaintiff further pleaded that it was the defendants' breach of the agreement, which resulted in the freight of onions remaining on the plaintiff's truck for an extended period of time and accordingly, the cause of the onions being damaged and becoming unfit for human consumption.

#### Plaintiff's case

[27] Mr Blaauw testified that he is a member of the plaintiff. The plaintiff is in the business of, amongst others, providing transport services to third parties. He testified that

since the plaintiff had a truck transporting a freight to Cape Town on or about 10 March 2021, he phoned Mr Naidoo early during March 2021 to discuss providing transport services to him from Cape Town to Namibia. He testified that he advised him that he represented Fysal. At the time, he did not state whether Fysal was a corporate entity or a natural person.

[28] He testified that prior to transporting the freights of onions on behalf of Fysal, the Plaintiff had no previous experience in the transportation of fresh goods.

[29] He testified that on 12 March 2021 he advised Mr Naidoo that the Plaintiff's truck was on its way to Ceres and enquired about the location where the freight of onions was to be loaded. During the discussion he had with Mr. Naidoo it was orally agreed that:

'29.1 The Plaintiff would render transport services to Fysal in respect of a freight of onions from Western Cape, South Africa, to Oshikango border post between Namibia and Angola;

29.2 Fysal would provide a driver to transport the Plaintiff's truck across the Oshikango border post into Angola to the town of Santa-Clara where the freight transported by the Plaintiff would be offloaded that was due to the Angolan government's Covid-19 travel restrictions, which prevailed at the time;

29.3 The turn-around time, for the off-loading of the freight of onions at Santa Clara Angola would be approximately two days per freight;

29.4 The Plaintiff would charge Fysal a transport fee of N\$45 000 for the transport services rendered from the Western Cape, South Africa, to Oshikango, Namibia;

29.5 The Plaintiff would issue invoices to Fysal in respect of the transport services rendered, which invoices would be payable by Fysal upon receipt thereof.

[30] He continued testifying that no other terms were agreed upon between the plaintiff and Fysal. More specifically, that there was never a discussion that, should the freight of onions not be accepted by the purchaser due to the fault of the plaintiff, Fysal would be entitled to damages from the plaintiff and Fysal would not pay for the transport of the freight of onions.

[31] He further testified that it was never discussed between himself and Mr Naidoo that the risk in and to the goods due to the goods becoming spoilt would transfer to the plaintiff whilst the goods were being transported by the plaintiff.

[32] He testified that the defendants deny that there exists a registered entity by the name Fysal Fresh Produce (Pty) Ltd. That is not correct. Annexure D is a screenshot obtained from the website of Namibian Business and Intellectual Property Authority ("BIPA"), which confirms that an entity registered under the aforesaid name with registration number 2015/0832 exists.

[33] He testified that the plaintiff's truck was loaded with the second freight of onions on Thursday, 25 March 2021, at Piketberg. The plaintiff's truck was thereafter driven to Oshikango at the Namibia – Angola border. He arrived at the Namibia – Angola border on Sunday, 28 March 2021. He testified that he sent the truck and driver documents through to Mr Naidoo and requested them to try and ensure that the truck could turn around as soon as possible.

[34] In so doing, the plaintiff complied with its obligations in terms of the agreement entered into between the plaintiff and Fysal. The plaintiff's truck crossed the Namibia – South Africa border on 26 March 2021 where the Namibian Agronomic Board inspected it.

[35] He phoned Mr Naidoo during the morning of 29 March 2021, to enquire who would drive the plaintiff's truck across the Namibia – Angola border to Santa Clara. Mr

Naidoo telephonically confirmed to him that it would be Mr Mbeeli, on the same day the plaintiff's truck was driven across the Namibia – Angola border to Santa Clara by Mr Mbeeli, as agreed. Before crossing the Namibia – Angola border on 29 March 2021, the freight of onions was again inspected by the Namibian Agronomic Board.

[36] He testified that during the course of Tuesday, 30<sup>th</sup> of March 2021, Mr Naidoo confirmed to him that the truck would return to Namibia the same day. Mr Naidoo, however, contacted him again during the afternoon of Tuesday, 30 March 2021, and advised that the truck would not be returning, but would return the next morning, being Wednesday, 31 March 2021. According to Mr Naidoo this was due to a bridge that was damaged on the Angolan side of the border.

[37] He testified that on 31 March 2021, the freight on the plaintiff's truck had still not been offloaded and the plaintiff's truck had still not returned to Namibia. By this time the agreed upon 2-day turnaround time for the offloading of the onions had lapsed. The two day turnaround time agreed between the parties was important, as the plaintiff required the use of its truck as soon as possible to transport other loads. He told Mr Naidoo that Mr Katjire's accommodation is costing the plaintiff N\$ 500 per day. He asked Mr Naidoo to sort out the issue causing the delay in off-loading of the freight of onions and the return of the plaintiff's truck to Namibia.

[38] He testified that on 1 April 2021, he again sent a message to Mr Naidoo to enquire what was transpiring with regard to the plaintiff's truck. Mr Naidoo sent him photographs of onions and told him that he is busy with the buyer. This was four days after the plaintiff's truck had to arrive at the Namibia – Angola border and three days after the truck had crossed the border into Angola.

[39] The fact that the purchaser only inspected the onions on Thursday, 1<sup>st</sup> of April 2021, was not due to any fault on the part of the plaintiff.

[40] He further testified that shortly thereafter Mr Naidoo phoned him and informed

him that their client rejected the freight of onions. He testified that on the advice of Mr Naidoo, he enquired from his insurance whether plaintiff is covered for such damages (spoiled onions) and the insurance company informed him that the plaintiff is not covered.

[41] On 2 April 2021, he again asked Mr Naidoo if the plaintiff's truck would be returning to Namibia on 2 April 2021. Mr Naidoo further confirmed that the freight of onions is also returning to Namibia. Mr Naidoo comforted him by confirming that the two of them would sort something out regarding the costs, which the plaintiff incurred in respect of its driver.

[42] On 4 April 2021, Mr Katjire advised him that the plaintiff's truck had finally returned to Namibia. This was 6 days after the truck crossed the Namibia – Angola border.

[43] He testified that during the morning of 6 April 2021, he again enquired from Mr Naidoo what transpired with regard to the plaintiff's truck. The plaintiff's truck finally returned to Windhoek on Wednesday, 7 April 2021 with the freight of onions and that prevented the plaintiff from transport, as the freight of onions was not offloaded.

[44] He testified that Mr Naidoo told him that the onions are now the property of the plaintiff and that the plaintiff would sell them, however the onions got rotten and could not be sold in Windhoek and they had to throw them away.

[45] He testified that due to the events, which transpired, as set out hereinbefore, the plaintiff's truck remained standing at the Namibia–Angola border post for a period of eight days. During this period, the plaintiff was required to pay for accommodation for Mr Katjire for four nights at a rate of N\$460 per night, totaling to N\$1840 including VAT.

[46] Due to the plaintiff's truck standing at the Namibia–Angola border post for a period of eight days, the plaintiff became entitled to standing fees. The fair and

reasonable industry related standard daily standing fees amounted to N\$3450 including VAT. In total N\$27 600.

[47] He further testified that the plaintiff was further required to transport the freight of onions from the Namibia – Angola border to Windhoek. Under normal circumstances, the plaintiff would not have transported the freight of onions to Windhoek. The fair and reasonable transport costs associated with transporting a freight from the Namibia-Angola border to Windhoek amounts to N\$15 000.

[48] He testified that on 13 April 2021, he sent Mr Naidoo two invoices for payment by Fysal. He testified that the defendants, despite demand refused to pay the aforementioned amounts.

[49] Under cross examination, Mr Blaauw admitted that he did not have any proof of what was paid to for the driver's accommodation.

[50] Mr Blaauw did not deny that the onions were spoiled; he only denied that the freight onions were spoiled because of the plaintiff's actions. He was further unable to deny that the load was inspected and rejected by the buyer as the freight onions were spoiled.

[51] Mr Katjire testified that he is employed as a truck driver by the plaintiff and that on 24 March 2021 he drove to Piketberg to the farm which Mr Nassif, the contact person, advised him where he was to load the freight of onions during the morning of 25 March 2021. He testified that the freight of onions was loaded on 25 March 2021. After they loaded the freight of onions, he closed the truck/freight with the Plaintiff's tarpaulins, as he always does, in order to ensure that the freight was not exposed to the weather. He also secured the freight of onions with nets and straps to make sure everything was tight and solid.

[52] On Friday 26 March 2021, he arrived at the Namibia – South Africa border. The

Namibian Agronomic Board inspected the freight. He thereafter travelled to the Namibia – Angola border post. He arrived at the Namibia – Angola post on Sunday 28 March 2021. At the border, it was raining and hot. However, due to the tarpaulins that covered the onions, the onions could not become wet during the rain.

[53] He testified that on Monday 29 March 2021 he handed over the Plaintiff's truck to the driver of the First Defendant, Mr Mbeeli. This was because he was not allowed entry into Angola because he travelled from South Africa. He thereafter booked into a hotel and informed Mr. Blaauw that the hotel costs N\$400 a day.

#### Defendant's case

[54] Mr Naidoo testified that he is the Manager of Fysal Brenner trading as Fysal Fresh. He has been employed with Fysal for the last 17 years.

[55] He testified that the second defendant is in the business of purchasing and selling fresh produce throughout Southern Africa. As such, they have relationships with various sellers, purchasers, re-sellers, transportation businesses, and so forth. In particular, they make use of many different transportation businesses in order to transport their fresh produce all over Southern Africa. This is necessary, as their own fleet is simply not large enough to transport all the produce that they purchase and sell.

[56] He testified that, in March 2021, he was contacted telephonically by Mr Blaauw of Super Game Dealers, and they discussed the possibility of Fysal using the transportation services of Super Game.

[57] He testified that after the discussions, it was agreed that plaintiff would provide transportation services to Fysal for a freight of onions from Cape Town, South Africa to the Santa Clara Multipark at the Namibian-Angolan border post. In terms of the agreement:

57.1 Fysal would pay the plaintiff a total of N\$ 45 000 for the transport costs.

57.2 The turn-around time for the off-loading of the freight of onions at the Santa Clara Multipark was dependent on the time that the truck would arrive and could take approximately three days and could change due to what transpires at the border.

57.3 The freight of onions had to be delivered within three days to the Santa Clara Multipark from the date of its collection in Cape Town, South Africa.

57.4 The freight of onions had to be stored in such a manner on the truck that the load would not go bad or become damaged during transport.

57.5 The freight of onions had to be stored in such a manner on the truck that the load would not be exposed to the natural elements that would result in the freight going bad or becoming damaged.

57.6 Plaintiff's truck driver would require a valid Covid-19 test in order to allow him to enter Angola and drive to the Santa Clara Multipark.

57.7 Should the freight of onions not be accepted by the client due to the fault of plaintiff, Fysal would be entitled to damages from plaintiff and Fysal would not pay for the delivery of the freight of onions.

[58] He testified that, when a transport company transports a load on behalf of a client, the transporter takes full responsibility for this load and whenever a load is lost or destroyed, the transporter reimburses the client for the loss. As such, they expected plaintiff to have the necessary insurance in place to cover their load.

[59] He testified furthermore that, at the time the agreement was concluded, plaintiff was aware of the abovementioned facts, and the agreement was entered into on the basis the facts mentioned in para 18 above.



[60] He testified that the load that the plaintiff had to transport was a load of 3 300 x 10 kilogram bags of onions. Fysal had sold the load to Ominku Yeto Limitado, a company situated in Lubango, Angola. This client purchased the load from Fysal for an amount of N\$135 300.

[61] He testified that, plaintiff's driver did not have the necessary covid-test results and that meant Fysal had to provide a driver to take the load and truck across the border to the Santa Clara Multipark.

[62] He testified that the plaintiff collected the load and transported it to the Angolan border. At the border, Fysal's driver took over the truck as plaintiff's driver did not have the necessary covid-test results to allow him to enter into Angola.

[63] He testified that when the truck crossed the border, the relevant border officials checked it to ensure that the load was in fact the load as per the permits.

[64] He further testified that the turn-around time at the Multipark was always an approximation and the time could vary depending on several factors outside of the parties' control. The delay at the border was due to the fact that the bridge had been damaged; the number of trucks at the border; and the Angolan customs system got overloaded.

[65] He testified that when the load arrived at the Santa Clara Multipark, the client inspected the load, and it became clear that the load had become wet and was spoiling. This meant that the load was no longer acceptable for the purposes for which the client had purchased the load.

[66] The client then rejected the load and it refused to pay for it. He testified that it was clear that the onions had not been safely secured and that the load had gotten wet

during transit. He testified that it rained while the load was being transported through Namibia and the fact that the onions were wet, clearly showed that the rain had gotten inside the trailer and had wet the onions. This is clearly why the client rejected the load.

[67] He testified that, it is important to note that the load could still be sold as it had not gone completely off. The fact was that the load was on the verge of going off (becoming spoilt/rotten). This meant that it had to be sold within the next day or two.

[68] He testified that, due to the load being a Goods in Transit (GIT) load, it could not be sold in Namibia as there were no permits to allow for this. This means that when the load left the Republic of South Africa, it was booked as GIT. The load was sealed by the proper authority and this seal could not be broken or tampered with as the load was destined for Angola. Once it reached the Namibian-Angolan border, the authorities checked the seal to ensure that the load had not been tampered with. For the load then to be sold in Namibia, new permits would have to be applied for.

[69] He testified that he then informed Mr Blaauw that the client had rejected the load and that they should ensure that Super Game contacts its insurance to reimburse Fysal for the loss. Mr Blaauw did in fact contact Super Game's insurance and was later informed that Super Game did not have the necessary insurance to cover Fysal's loss. Mr Blaauw was then given the option to keep the load and reimburse Fysal for the value of the loss. He accordingly agreed that Super Game would keep the load and pay Fysal for his loss.

[70] He testified that, soon thereafter, when he was looking for the load, it came to his attention that Mr. Blaauw had removed the truck and the load from the border and had the truck and load delivered to plaintiff's warehouse in Windhoek. This occurred without Fysal's or his permission.

[71] He denied that Fysal is in anyway responsible for any of the damages claimed by Super Game. The damages that second defendant suffered is due to the fact that the load of onions got wet in transit which resulted in the client refusing to accept the load.

[72] He testified that Fysal has in fact suffered a loss in the amount of N\$135 300 due to the fact that he could not sell the load to the intended client.

### Issues for determination

[73] In terms of the Pre-Trial Order the issues of fact and law which remain in dispute were as follows:

73.1 Whether the plaintiff contracted with the first or second defendant.

73.2 Whether it was agreed between the parties that:

73.2.1 the freight of onions had to be delivered within three days to the Santa Clara Multipark from the date of its collection in Cape Town, South Africa;

73.2.2 the freight of onions had to be stored in such a manner on the truck that the load would not go bad or become damaged during the three day trip the freight of onions had to be stored in such a manner on the truck that the load would not be exposed to the natural elements that would result in the freight going bad or becoming damaged;

73.2.3 should the freight of onions not be accepted by the client due to the fault of plaintiff, the defendant would be entitled to damages from plaintiff and the defendant would not pay for the delivery of the freight of onions.

73.3 Whether at the time that the agreement was concluded, the plaintiff was aware of the following facts, and the agreement was entered into on the basis of these fact:

73.3.1 if the freight of onions was not delivered within the specified time, the freight would go bad, and the client would not accept the freight of onions;

73.3.2 if the freight of onions was not properly stored during the transportation by the plaintiff, the onions would go bad, and the client would not accept the freight of onions;

73.3.3 if the freight of onions was not properly stored during the transportation by the plaintiff and be exposed to the natural elements which resulted in the onions going bad or being damaged, and the client would not accept the freight of onions; and

73.3.4 if the freight of onions went bad and, as a direct result of the onions going bad, the client refuses to accept delivery thereof, the defendant would suffer losses in the amount of N\$135 300, being the purchase price the client would pay for the delivery of the onions.

73.4 Whether at all times relevant hereto Plaintiff publicly held itself out to be an expert in the transportation of perishable goods.

73.5 Whether the agreement between the parties contained an implied warranty against any latent defects and/or faults and/or breaches which would render the freight of onions unfit for delivery to the client.

- 73.6 Whether it was agreed between the Plaintiff and Defendant that the freight of onions would be transported at the Plaintiff's risk.
- 73.7 Whether the Plaintiff successfully rendered the transport services to the Defendant and is entitled to payment in the amount of N\$45 000.
- 73.8 Whether it was at all relevant times within the contemplation of the parties that should the Plaintiff's truck be delayed for any reason not attributable to the Plaintiff, the Plaintiff would suffer losses due to its inability to use its truck. Whether in such circumstances the Defendant would be liable for the payment of daily standing fees to the Plaintiff at a market related rate.
- 73.9 Whether the Defendant's client refused to accept the onions.
- 73.10 Whether due to the Plaintiff's remaining in Oshikango until 6 April 2021:
- 73.10.1 The Plaintiff was required to pay for accommodation for its driver for a period of 4 nights at a rate of N\$ 460-00 per night, totaling N\$1 840 (including VAT);
- 73.11 Whether the Plaintiff's truck remained standing for a total of 8 days and if so, whether the fair and reasonable industry-related standard daily standing fees amount to N\$3 450.
- 73.12 Whether the total standing fees incurred due to the Plaintiff's truck standing at the Oshikango border post amounted to N\$ 27 600 (including VAT).
- 73.13 Whether the Plaintiff was required to transport the freight of onions from Oshikango to Windhoek, whereas under normal circumstances the Plaintiff would not have transported the freight to Windhoek.

73.14 Whether the fair and reasonable transport costs associated with transporting a freight from Oshikango to Windhoek amounts to N\$ 15 000.

73.15 Whether the Plaintiff therefore suffered damages due to the Defendant's alleged actions in the amount of N\$44 440.

[74] It is further important to consider that at the time the freight left the plaintiff's control at Oshikango, whether the driver provided by the defendant took custody of the plaintiff's truck (and the freight) and drove it across the border.

[75] The defendant then kept the plaintiff up to date on the turn-around time of the Plaintiff's truck. At no stage after the truck and freight were handed over to the driver provided by the defendant did the plaintiff have any control of his truck. To retrieve his truck, the plaintiff could not simply order its truck to return, Mr Naidoo was in control at all relevant times. The plaintiff had to demand the return of its truck from the Defendants

#### Submissions on behalf of plaintiff

[76] Counsel submitted that the plaintiff did not breach the agreement as alleged by the defendants in that the plaintiff<sup>1</sup> collected the freight of onions on 25 March 2021, and not 17 March 2021 as alleged; and/or transported the freight of onions in such a manner as to ensure that the freight would not perish and/or go bad and/or get damaged in that the freight of onions was exposed to rain and, as a direct result of the rain, became wet and started to mold, thereby going bad.

[77] Counsel contended that the direct and credible evidence of Mr Katjire shows that the onions were stored on the truck in such a manner that it was not exposed to rain and could not get wet. The defendant failed to cross-examine Mr Katjire on any aspect of the storage of the onions during transport, and therefore his version, that the onions were safely stored in such a manner that it was not exposed to the natural

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<sup>1</sup> Par 1.15 of the Pre-trial order.

elements may be accepted as correct.<sup>2</sup>

[78] Counsel submitted that in addition, thereto, Mr Naidoo testified that when the onions entered Angola on 29 March 2021 it was found to be fit for human consumption by the customs officials. The same check was done when the onions left South Africa for Namibia. A phytosanitary certificate was issued to certify that the onions were inspected and that they are fit for human consumption. Annexure B1 to Exhibit C reflects the phytosanitary certificate for the South Africa/Namibia border inspection, while annexure B2 to Exhibit C reflects the phytosanitary certificate for the Namibia - Angola inspection

[79] Counsel argued that, Mr Naidoo also confirmed that even a day or two after the alleged inspection on 1 April 2021, the onions were still not rotten and could be sold. It delivered the freight of onions in such a state that the client could accept delivery thereof.

[80] Counsel submitted that for the reasons set out above, it is trite law that Defendants now carries the burden to prove, on a balance of probabilities, that the parties agreed to further terms and that the Plaintiff did not comply with those additional terms.

[81] Counsel submitted that Mr Blaauw on behalf of the Plaintiff was a credible witness, forthcoming and frank in his evidence. His demeanor was good and there were no internal or external contradictions in his evidence. The caliber and cogency of his performance in the witness box cannot be faulted on any valid ground. He was never unwilling to answer any questions in cross-examination and he never evaded

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<sup>2</sup> See *Smith v Small* 1954 3 SA 434 (SWA) AT 438-E-F where it was held that 'It is grossly unfair and improper to let a witness's evidence go unchallenged in cross-examination, and afterwards argue that he must be disbelieve.' In *President of the Republic of South Africa v SARFU* 2000(1) SA 1 (CC) at para [61] it was held that "...If a point in dispute is left unchallenged in cross-examination, the party calling the witness is entitled to assume that the unchallenged witness testimony is accepted as correct..." This position has been reiterated on a number of occasions, most recently by the Supreme Court in *Ugab Terrace Lodge CC v Damaraland Builder CC* (SA 51-2011) [2014] NASX (25 July 2014).

questions. His versions are probable and were not rebutted.

[82] Counsel submitted that the defendants' counterclaim should be dismissed on the basis that save for an invoice issued by a 3<sup>rd</sup> party to the alleged purchaser (which in any event amounts to inadmissible hearsay evidence), the Defendants tendered no evidence at all in respect of the reasonable market value of the freight onions. It is therefore submitted on behalf of the Plaintiff that the Defendant failed to prove the quantum of its damages. Furthermore, the invoice clearly indicates that Nine Yards Logistics (Pty) Ltd sold the onions to Ominlu Yetu. The invoice obviously creates an obligation for Ominlu Yetu to pay Nine Yards Logistics (Pty) Ltd, and not the Defendant. By its own admission, the Defendant is attempting to claim a loss allegedly suffered by an entity which is not a party to this matter.

[83] Counsel submitted that the plaintiff also instituted a claim against the defendants because its truck could not return to his possession and control within the agreed to turn around time of two days. As a result of the eight days that the Plaintiff's truck was standing for, the Plaintiff incurred costs in the amount of N\$1840 (including VAT) for accommodation for its driver; was required to transport the freight of onions from Oshikango to Windhoek, whereas under normal circumstances the Plaintiff would not have transported the freight to Windhoek. The fair and reasonable transport costs associated with transporting a freight from Oshikango to Windhoek amounts to N\$15 000 suffered damages in the amount of N\$27 600 (including VAT), which is the fair and reasonable industry-related standard daily standing fees of N\$3450 for eight days. (No expert evidence was tendered in that regard).

[84] Counsel contended that Mr Blaauw confirmed the above position and was not cross-examined on his evidence. The Defendant answered the claim with a plea of no knowledge and led no evidence in rebuttal to the evidence of Mr Blaauw. The Plaintiff therefore proved its second claim.

Submissions on behalf of defendant



[85] Counsel referred this court to *Anderson Shipping (Pty) Ltd v Polysius*<sup>3</sup> where the Court held that:

‘In general, a carrier’s liability depends on the terms of the contract between the carrier and the principal. In the absence of any term dealing with liability, it is assumed that the carrier has a duty to exercise reasonable care.’

[86] Counsel also referred to *Alex Carriers (Pty) Ltd v Kempston Investments*<sup>4</sup> where it was held that:

‘a carrier has a duty to exercise reasonable care to look after goods entrusted to it. Furthermore, that if such goods are damaged or lost, the carrier is liable for the damages suffered unless the carrier can show that same occurred without *culpa* or *dolus* on its part.’

[87] Counsel argued that the plaintiff has the *onus* to prove the terms of the contract and the plaintiff has to prove to the court all the terms of the agreement; including, any exclusions of liability.

[88] Counsel submitted that a carrier must show that it transported the goods without damage. In these circumstances, a defendant is entitled to refuse payment and to claim damages. Counsel argued that the onions were damaged by the water that entered the truck because it was not properly stored or secured against the rain due to the fault of the plaintiff.

[89] Counsel submitted that Plaintiff has the *onus* to prove that any loss or damage occurred without its fault. Plaintiff has the onus to prove that the agreement excludes the specific loss claimed.

[90] Counsel contended that in the case where the goods are lost or damaged, the courts will endeavor to place the owner of the goods in the same position it would have

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<sup>3</sup> *Anderson Shipping (Pty) Ltd v Polysius* (1995(3) SA 42(A).

<sup>4</sup> *Alex Carriers (Pty) Ltd v Kempston Investments (Pty) Ltd & Another* (1998(1) SA 662(E).

been had the loss not occurred.

[91] Counsel submitted that the value of the goods is calculated as the actual value of the goods at the place of destination and is not restricted to the cost price thereof. Counsel contended that no expert witness was called to testify about the reasonable amount will be for the eight days that the truck stood at the border.

[92] In relation to the counterclaim, counsel submitted at the heart of the defendants' defense and counterclaim, are the questions of: whether or not plaintiff was contracted to deliver the onions to Santa Clara Multi Park, Angola; whether or not the onions were damaged and as a result of the damage, the onions were rejected by defendant's client; as such, plaintiff materially breached the agreement and is not entitled to being remunerated; and defendant is entitled to being reimbursed for the loss of the onions.

#### Determination

[93] Mr Naidoo for the defendants testified that he had worked for the defendants for 17 years. Over those years, he had liaised and negotiated agreements with different transporting companies for purpose of transporting perishable goods of the defendants in the southern African region and as a result, he had the necessary experience in negotiating agreements with transport companies.

[94] The plaintiff, on the other hand, had no experience in transporting perishable goods nor experience in negotiating such agreements when the oral agreement was entered into between the parties.

[95] Mr Naidoo testified that he informed Mr Blaauw that the onions had to be stored in such a way that they are not exposed to natural elements such as a rain, as they will get bad or rotten if exposed. He also testified that he informed Mr Blaauw that if the onions got bad the buyer will not accept them and the plaintiff has to take responsibility and reimburse the defendants and the plaintiff will not be paid for transporting the

onions. Given the experience of Mr Naidoo in negotiating such agreements for the past 17 years, it is highly probable that those were the terms of the agreement and that his version on that score is plausible.

[96] Mr Naidoo testified that it was clear that the onions had not been safely secured and that the load had gotten wet during transit. He testified that it rained through Namibia while the load was being transported and the fact that the onions were wet, clearly showed that the rain had gotten inside the trailer and had wet the onions and that is why the client rejected the load.

[97] The evidence that it was raining had been corroborated by Mr Katjire, the driver of the truck, who testified that when he arrived at the border between Angola and Namibia it was raining. The photographs taken of the onions at the border also showed that the onions had gotten wet.<sup>5</sup>

[98] His version is more plausible as to the terms of the agreement. The only reasonable inference to be drawn from the fact that the onions had gotten wet is that the freight of onions was not stored in such a manner on the truck as to prevent the rain from entering the truck, otherwise how did the rain enter the truck?

[99] In my view, the plaintiff was in breach of the agreement by failing to ensure that the onions were stored in such a way that they would not be exposed to rain. The probabilities are that the rainwater entered or managed to penetrate the tarpaulins and the onions got wet.

[100] The onions were in the custody and/or care of the plaintiff and the plaintiff must take responsibility for the damaged caused to the onions/plaintiff breached the term the agreement by not ensuring that the onions were properly stored. In this instance, I agree with counsel for the Defendant that a carrier has a duty to exercise reasonable care to look after goods entrusted to it.

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<sup>5</sup> The photographs were admitted into evidence as Exhibit F.

[101] Furthermore, the plaintiff failed to show that the damage to the onions occurred without culpa or *dolus* on its part. In *Boshoff t/a Etosha Meubelvervoerders v Pupkewitz & Sons(Pty) Ltd*<sup>6</sup> the court held that: 'A carrier claiming remuneration must allege and prove due performance of the contract. If the defendant alleges that the goods were damaged or lost, the carrier must establish the contrary.'

[102] The Plaintiff has the *onus* to prove the terms of the contract.<sup>7</sup> Mr Naidoo also testified that the turnaround time of three days was an approximation as the time depended on factors beyond their control such as the number of the trucks at the border, the bridge being damaged by the rain on the Angolan side that delayed the truck crossing into Angola.

[103] As far as the claims of N\$27 000 standing time of the truck and the accommodation for the driver are concerned, that was caused by circumstances beyond the control of the defendants such as the bridge that was damaged causing delay in the truck crossing the border into Angola. Most importantly, the plaintiff failed to adduce expert evidence to show what the reasonable daily rate was for the standing time of the truck. Mr Blaauw under cross-examination also admitted that he did not have any proof of what was paid for the driver's accommodation.

[104] As far as the plaintiff's claim for N\$15 000 to transport the onion back to Windhoek is concerned, that would not have been necessary had the rain not damaged the onions and for that reason that claim cannot stand.

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<sup>6</sup> *Boshoff t/a Etosha Meubelvervoerders v Pupkewitz & Sons (Pty) Ltd* 3 All SA 13(SWA), 1984(2) SA 24(SWA).

<sup>7</sup> *Stocks & Stocks*, supra at 7.

<sup>9</sup> *Boshoff*, supra at 24 C-D.

<sup>10</sup> *LAWSA* supra at para 88.

<sup>11</sup> *LAWSA* supra at para 88.

<sup>14</sup> *Stocks & Stocks*, supra at 762.

<sup>15</sup> *LAWSA* supra at para 88.

<sup>16</sup> *Ibid* at para 90

[105] In respect of the counterclaim, counsel for the plaintiff correctly submitted that save for an invoice issued by a third party to the alleged purchaser (which in any event amounts to inadmissible hearsay evidence) the defendant adduced no evidence at all in respect of the reasonable market value of the freight onions and therefore the defendants failed to prove the quantum of their damages.

[106] Furthermore, the invoice clearly indicates that Nine Yards Logistics (Pty) Ltd sold the onions to Ominlu Yetu. The invoice obviously creates an obligation for Ominlu Yetu to pay Nine Yards Logistics (Pty) Ltd, and not the defendant. By its own admission, the Defendant is attempting to claim a loss allegedly suffered by an entity, which is not a party to this action.

[107] Counsel for the plaintiff correctly submitted that it is common cause that there exists a registered entity by the name of Fysal Fresh Produce (Pty) Ltd and the defense of the defendants that such an entity does not exist stands to be rejected.<sup>8</sup>

### Conclusion

[108] In the result, both the plaintiff and defendants failed to prove their respective claims.

### Order

1. The plaintiff's claims are dismissed.
2. The defendants' counterclaim is dismissed.
3. There is no order as to costs.

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<sup>8</sup> Par 1.1 of the Pre-trial Order.

