REPORTABLE

CASE NO. SA 45/2008

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

INTERNATIONAL BUSINESS BUREAU (PTY) LTD **APPELLANT**

and

THE GOVERNMENT OF THE REPUBLIC NAMIBIA **RESPONDENT**

Coram:	Shivute CJ, Maritz JA *et* Langa AJA
Heard on:	2010/03/26
Delivered on:	2011/06/09

APPEAL JUDGMENT

LANGA AJA

Introduction

[1] This is an appeal from the judgment and an order of absolution from the instance with costs made against the appellant, the International Business Bureau (Pty) Ltd, by the High Court of Namibia (per Hinrichsen AJ) on 12 September 2008. The respondent, the Government of the Republic of Namibia, has also filed what it refers to as a cross appeal which is conditional upon this Court deciding to

interfere with the judgment of the Court *a quo.* Nothing further need be said about the cross appeal as it was not pursued in this Court.

Factual Background

[2] The appellant claims payment of the sum of N$1 472 870.00 and costs from the respondent. The facts giving rise to the claim have been detailed adequately in the judgment of the Court *a quo* and what is set out below is a mere summary to facilitate a better understanding of the reasoning in this judgment. During or about April 2003 the appellant, whose managing director is Mr Omar, was invited to tender for the supply and delivery of white maize meal under a scheme run by a body referred to as the "Emergency Management Unit" (EMU) which is housed in the Office of the Prime Minister of Namibia. The tender had to be on a document issued by the Tender Board of Namibia. Details of the tender appeared under a heading "Specifications and Conditions". Before the closing date for the submission of tenders, the appellant was informed in writing by the Tender Board that the tender document, containing Specifications and Conditions had been amended. The effect of the change was to remove that portion from the Specifications and Conditions that read: ***"Quotations should meet the requirements of the Namibian Agronomic Board in respect of permits for the import of maize meal".*** Replacement pages incorporating the change were sent to the appellant who, on 30 April 2003, submitted its quotation in terms of the invitation to it, as amended. The tender by the appellant was accepted by the Tender Board in respect of three regions, namely, Caprivi, Otjozondjupa and Kavango Regions, for the delivery of maize meal and the EMU subsequently issued the appellant with an order for the supply of the maize meal as tendered.

[3] On or about 30 May 2003, when trucks commissioned by the appellant attempted to cross the border into Namibia to deliver the maize meal, entry was refused because import permits, which should have been issued by the Namibian Agronomic Board (NAB), could not be produced. The appellant accordingly failed to deliver the maize meal. The appellant lays the blame for this failure to deliver in terms of the orders at the door of the respondent and hence the claim for damages allegedly suffered by the appellant. It should be noted that the claim for damages is directed solely at the respondent, the Government of Namibia, and that neither the Tender Board nor the NAB have been cited as parties in the proceedings. Respondent denies any liability for the damages claimed.

The essence of the dispute

[4] The appellant's case in the High Court and again on appeal is based on contract, alternatively delict. The alleged contract is described in paragraph 10 of the appellant's amended particulars of claim which state:

> "It was an express, alternatively implied, alternatively a tacit term of the contract between the parties that it was **not** a requirement of the contract that the Plaintiff would need an import permit or permits in respect of the maize meal to enter the borders of Namibia, alternatively that the Defendant would be responsible to arrange for the entrance of the vehicles conveying the maize meal to Namibia, with or without permits."

Put differently, the appellant contends that the respondent breached the agreement between it and the appellant by failing to ensure that such import permits as were required were obtained or that delivery of the imported maize

meal was allowed to proceed without the formality of the issuance or production of import permits. It is a matter of record that this is the stance that the appellant adopted and maintained throughout the proceedings. This much is clear from the pleadings and the helpful judgment on exception of Mtambanengwe AJ, delivered on 28/11/2005 (Case No. 1380/2005). Appellant's alternative claim is based on delict and relies on the alleged fraudulent or negligent misrepresentation by the officials of the respondent who, it is said, misled the appellant, thereby inducing it to act to its detriment.

The question of *onus*

[5] It is trite, as was also acknowledged by the Court *a quo*, that the *onus* was on the appellant to prove the agreement between itself and the respondent, as well as its terms. As far as the misrepresentation is concerned, the *onus* is likewise on the appellant to prove its case on a balance of probabilities. In its attempt to discharge the *onus* to prove the agreement and its terms, the appellant relied on the evidence of Mr Omar, who was its sole witness as well as inferences or conclusions to be drawn from the amendment to the Specifications and Conditions of the tender document and alleged conversations with officials in the employ of the respondent.

Who is the importer?

[6] In setting the scene for the appellant's case, it was contended by counsel for the appellant that the respondent, and not the appellant, was the importer of the maize meal. If the contention were correct, it would be in line with appellant's interpretation of the agreement, namely, that the responsibility to obtain import

permits, if they were not waived, was that of the respondent. This of course became a bone of contention between the appellant and the respondent and was one of the principal issues to be decided by the Court *a quo*. One however, searches in vain to find facts to support this contention. In the first place, the invitation by the Tender Board to tender was addressed to the appellant. It is clear that the Tender Board represented the respondent during that stage of the process. Furthermore, all the documentation on record points to the appellant as being the importer of the maize meal from the South African supplier, SASKO. There is no relationship, contractual or otherwise, that exists as between the supplier of the maize meal, (SASKO) and the respondent. In addition, correspondence from SASKO requests the appellant to furnish the supplier with a customs import permit, presumably to facilitate delivery of the maize meal, and an exemption certificate, stating that the 1841 tons of maize meal were free from all taxes and import taxes, and import permit requirements. There is no evidence that SASKO, the supplier, and DAS Logistics, the transporter, at any stage communicated with the respondent directly, thus making the appellant redundant. On the contrary and by his own admission, Mr Omar had in the past maintained contact between himself and the supplier, SASKO and DAS Logistics, in prior dealings with SASKO in regard to imports to Angola and the Democratic Republic of Congo, and other products that were imported. There is no evidence of this type of contact between the respondent and the suppliers as well as the transport company. The contentions regarding who the importer is have a direct bearing on the appellant's submissions that there was an agreement between the parties that the issue of import permits would be the responsibility of the respondent and not

the appellant. I accordingly agree with the conclusion of the Court *a quo* that the importer is the appellant and not the respondent.

Evaluation of the evidence

[7] It will be convenient at this stage to detail the different versions given on behalf of the parties regarding the nature and detail of the agreement. The appellant received the tender documents by fax on 23 April 2003. The fax indicated that enquiries were to be directed to Ms Onesmus, the Secretary of the Tender Board. Page 3 of the original tender documents had contained the provision that was removed by the amendment. According to Mr Omar in his evidence, he at that stage had no idea what the Agronomic Board was, having had no dealings with it in the past and he accordingly contacted Ms Onesmus to find out, presumably, what this reference to the Agronomic Board was all about. According to Mr Omar, Ms Onesmus informed him not to worry about that as that part of the requirements had been waived. She said further that the change had been asked for by the EMU. Mr Omar then spoke to Mr Kangowa of the EMU who confirmed this information "because there would be no requirement to obtain approval or exemption from the Agronomic Board to import maize into Namibia." When the appellant received replacement pages on 28 April 2003, it took it as confirmation of its interpretation of the agreement, namely, that the requirement for import permits had been waived in its case, or that the respondent had undertaken to make all the necessary arrangements, relieving the appellant of the duty to obtain import permits. Mr Omar's case is that this intimation conveyed to him (and was calculated to convey) that the requirement for import permits had been waived by the respondent.

[8] Mr Omar's evidence contrasts sharply with that given by the witnesses called on behalf of the respondent. Ms Onesmus' version is that she had worked for the Tender Board for seven years. She had no recollection of the statements ascribed to her by Mr Omar. As the secretary of the Tender Board, her function was to take instructions from the Tender Board and she did not have authority to give assurances, interpretations and react to representations of the type ascribed to her by Mr Omar. She certainly did not tell Mr Omar not to comply with the legal requirements for the importation of maize meal. In cross examination Ms Onesmus stated:

> "I did not give any interpretation of this clause to anybody because this document came from EMU, the enquiry person is clearly indicated on the document that it is EMU and I am not responsible for knowledge of permits whether it is needed or not." (See record page 354.)

[9] The high point of the evidence of Ms Onesmus is that she referred Mr Omar to the EMU. Hinrichsen AJ, was favourably impressed by the evidence of Ms Onesmus. Indeed, given the relative positions occupied by Ms Onesmus at the Tender Board on the one hand and Mr Omar, an experienced international trader who, in his evidence described himself as an expert, on the other, the conclusion in favour of the veracity of Ms Onesmus was compelling. The evidence of Ms Onesmus therefore does not assist the appellant to establish the facts required to prove its version of the agreement and its terms, or alternatively, the misrepresentation it alleges. This evidence is supported by the fact that Mr Omar then, according to his legal practitioner's letter dated 26 June 2003, pursued his

enquiries with Mr Kangowa of the EMU. In the circumstances, the finding of the Court *a quo*, preferring the evidence of Ms Onesmus to that of Mr Omar cannot be faulted.

[10] Mr Omar's version of the content of his conversations with Mr Kangowa is also at variance with that of Mr Kangowa in material respects. Mr Omar claims to have seen Mr Kangowa more than ten times. Mr Omar claims that Mr Kangowa told him that because of the drought relief situation, the Agronomic Board requirement for import permits for maize meal had been waived. Mr Kangowa denies in the first place that he made any such representation to Mr Omar and states that dealing with permits was not his responsibility. He confirmed that the tender invitation emanated from the EMU and that he had assisted Mr Omar at the latter's request with a contact person at the delivery point, the location of warehouses for the storage of maize meal, and sending information to the border by fax. Mr Omar assured Mr Kangowa that he, Mr Omar, would get maize meal from South Africa because he had already spoken to the Agronomic Board. Mr Kangowa denied that he told Mr Omar anything that could have led the latter to conclude that there was a waiver by the respondent of the requirement for an import permit; or that the respondent would make the necessary arrangements to obtain the permits. The evidence in fact reveals that on 21 May 2003, even before the appellant received the orders, Mr Omar had been told by Mr Araeb in no uncertain terms that the Agronomic Board and EMU were responsible for permits and that he needed the permits to import maize meal into Namibia. Mr Kangowa testified rather that he went out of his way in an attempt to assist the appellant, at a time of crisis, when appellant was faced with a refusal to allow delivery of the

maize meal through the Namibian border. Nothing here constitutes evidence of an assumption of responsibility by the respondent or its officials, to obtain the import permits or waive the legal requirement for them. Under cross-examination, Mr Omar was quite clearly unable to surmount the obstacles facing appellant's case. Given our conclusion on the facts of the matter, we do not find it necessary to express any views on whether any of the officials had the competence to waive compliance with a legal requirement prescribed by Act of Parliament for the importation of maize meal.

[11] The appellant's alternative claim was originally based on the allegation that the officials of the respondent, acting in the course and within the scope of their employment, represented to the appellant that the respondent would waive the requirement for import permits or would arrange for their procurement. This leg of the appellant's case collapsed when the evidence of Ms Onesmus and that of Mr Kangowa did not support that of Mr Omar in this aspect. On the contrary, quite apart from the evidence of these two officials, there was strong evidence that Mr Omar was told quite firmly that it was his duty to obtain the import permits. Mr Omar in fact went on to request an official of the Board to give him an import permit. In the end what the appellant had to prove in the trial court was not only that it had entered into an agreement with the respondent for the delivery or supply of maize meal into Namibia, but also the terms of that agreement. It is here that the appellant, who bore the *onus*, could not make headway. On the evidence presented to the Court *a quo,* the appellant did not succeed in bringing this evidence to court and it is difficult to see how the High Court could have come to a different conclusion.

[12] A number of witnesses testified on behalf of the respondent, the first two of which were two officials in the employ of the respondent, namely, Ms Onesmus of the Tender Board of Namibia and Mr Kangowa, the Director of EMU. The evidence of several other witnesses (Mr Araeb and Mr Brock) merely added to the difficulties the appellant encountered and went to underscore the failure of the appellant to bring evidence to support its case. At the end of the day, therefore, it was clear that the appellant had not succeeded to prove its case on a preponderance of probabilities.

[13] Both in the trial Court and in argument on appeal, the appellant relied on what it claimed was the significance to be ascribed to the removal of paragraph 11.1 from the Specifications and Conditions issued by the Tender Board, together with assurances and misrepresentations allegedly received from officials of the respondent. At the end, however, the amendment to the Specifications and Conditions merely proved to be a red herring. It had no impact on the detail of the agreement between the appellant and the respondent. Mr Omar, particularly when under cross-examination, was unable to sustain the allegation that the two officials in the employ of the respondent misrepresented the true position to him. In the end, the Court *a quo* correctly found that the terms of the agreement, as contended for by the appellant, had not been proved. Nor was there proof, on a balance of probabilities, of the representations as alleged by the appellant, made by the servants or officials of the respondent. The appeal must accordingly be dismissed with costs.

[14] Order:

The appeal is dismissed with costs, such costs to include the costs of one instructing and one instructed counsel.

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LANGA AJA

I agree.

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SHIVUTE CJ

I agree.

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MARITZ JA

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