REPUBLIC OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT, JOHANNESBURG

CASE NO: 07/26188

(1) REPORTABLE: YES / ~~NO~~
(2) OF INTEREST TO OTHER JUDGES: YES/~~NO~~
(3) REVISED.

4/5/2012
DATE

SIGNATURE

In the matter between:

MARTINAIR HOLLAND N.V. Plaintiff

and

AIRLINE CARGO RESOURCES (PTY) LTD First Defendant

TIMEWISE COURIERS CC t/a PRO AFRICA TRUCKING Second Defendant

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J U D G M E N T

MOSHIDI, J:

INTRODUCTION

[1] This case concerns a claim for damages to goods in transit by road from OR Tambo International Airport, Johannesburg, to Durban, KZN, on 18 April 2005.

[2] The plaintiff has instituted action against the defendants for damages suffered as a result of certain goods (described below) which were damaged in the course of being conveyed from OR Tambo International Airport to Durban.

SEPARATION OF ISSUES

[3] At the commencement of the trial, there was already in place a court order effectively separating for determination the issue of the plaintiff's quantum of damages to that of liability. Consequently, the only issue for adjudication in this trial is that of liability or the merits.

THE CASE ON THE PLEADINGS

[4] In order to place the matter in proper prospective, the relevant allegations in the particulars of claim dealing with the merits are necessary to reproduce *verbatim*. These are paragraphs 4, 5, 6, 7, 8, 9, 10, 13, 14 and 15 which respectively, read as follows:

> "*CLAIM A*
>
> 4. *Prior to 12 April 2005 the plaintiff and the first defendant, both duly represented, entered into a partly oral and party written agreement at Johannesburg, alternatively Amsterdam ("the agreement"). A copy of the written portion of the agreement is attached hereto marked POC1.*
>
> 5. *The material express, alternatively tacit, further alternatively implied term of the agreement were, inter alia, that:*

5.1 *the plaintiff would, from time to time, engage the first defendant's cargo trucking services in respect of goods and cargo for and on behalf of the plaintiff at the first defendant's usual charges in regard thereto;*

5.2 *The first defendant warranted that it had insurance to cover any loss or damage incurred whilst goods were in transit. The first defendant warranted that it was insured for an amount of R5 million per load on the trucks;*

5.3 *The first defendant would exercise reasonable care in respect of any goods or cargo entrusted to it and that the same would be delivered to its intended destination in the same condition in which it was received.*

6. *Alternatively to paragraph 4 above, and prior to 12 April 2005, the plaintiff and the first defendant conducted themselves in accordance with the terms referred to in paragraph 5 above, read with POC1, and a tacit agreement was thereby constituted according to the aforegoing terms ("the agreement").*

7. *Pursuant to the agreement and on or about 18 April 2005 the first defendant's cargo trucking services were engaged to transport a consignment of 3 pieces of machinery from Johannesburg to Durban ("the goods").*

8. *The first defendant, in turn, sub-contracted the aforegoing cargo trucking services in respect of the goods to the second defendant.*

9. *The goods did not arrive at their destination in an undamaged state as a consequence of the same having been damaged during transit from Johannesburg to Durban on or about 18 April 2005.*

10. *In breach of the agreement, the first defendant:*

10.1 *failed to exercise reasonable care in respect of the goods entrusted to it;*

10.2 *failed to procure the delivery of the goods to their intended destination in the same condition in which they were received;*

10.3 *has breached the warranty by failing to insure the goods against any loss or damage incurred whilst in transit, alternatively by failing to indemnify the plaintiff or procure that the plaintiff would be indemnified in respect of insurance cover warranted by it in respect of any loss or damage caused to the goods whilst in transit.*

CLAIM B (ALTERNATIVELY TO CLAIM A)

13. *The plaintiff repeats the contents of paragraph 4-9 above.*

14. *The second defendant, whether as the first defendant's sub-contractor or not but nevertheless having taken possession of the goods, owed to the plaintiff, who bore liability for, alternatively the risk in and to, the goods, a duty of care:*

    14.1 *ensure that the goods were delivered at their intended destination in the same condition in which they were received;*

    14.2 *take reasonable care in respect of the goods whilst in its care.*

15. *On 18 April 2005 and whilst the goods were in transit between Johannesburg and Durban and being transported by the second defendant by one of its employees, such employee at the time being in the course and scope of his employment with the second defendant, breached the duty of care by negligently:*

    15.1 *attempting to overtake another vehicle when it was unsafe or inopportune to do so;*

    15.2 *driving at an excessive speed under the circumstances;*

    15.3 *failing to keep a proper look-out;*

    15.4 *failing to apply the brakes of the vehicle timeously;*

    15.5 *Failing to exercise the degree of diligence and care required of the class of vehicle in question driven by such employee in overtaking a vehicle of another class towing at least one trailer, at night;*

    and so doing lost control of the vehicle driven by him, causing the vehicle to roll and thereby causing damage to the goods."

[5] The first defendant's response to the above allegations as reflected in the final amended plea reads as follows:

"4. AD PARAGRAPH 4

4.1 *Save to admit that the Plaintiff did, from time to time engaged the First Defendant's Cargo Trucking Services in respect of goods and cargo for and on behalf of the Plaintiff at the First Defendant's usual charges in regard thereto the allegations herein are denied.*

4.2 *It is further denied that Annexure "POC1" to the particulars of claim constitutes an agreement between the Plaintiff and the First Defendant.*

4.3 *Alternatively, and in the event of the Honourable Court finding that there was indeed an agreement concluded between Plaintiff and First Defendant in terms of Annexure "POC1", which is denied, the First Defendant pleads that any such agreement would be applicable only to the First Defendant's fleet as specified in "POC1".*

4.4 *First Defendant denies that this particular consignment fell within its fleet as described in Annexure "POC1" and it was in fact an ad hoc agreement for which a specific vehicle outside of the First Defendant's fleet, i.e. a vehicle of the Second Defendant would be contracted and quoted for.*

4.5 *Further alternatively, and in the event of the Honourable Court finding that there was indeed an agreement concluded between the Plaintiff and the First Defendant in terms of Annexure "POC1", which is denied, and that such agreement was applicable to this particular consignment, which is denied, the First Defendant pleads as follows:*

4.5.1 *It was further express, alternatively implied, further alternatively tacit term of the agreement that the insurance warranted by the First Defendant would not cover any loss or damage incurred whilst the goods were in transit if such loss or damage was attributable to no fault on the part of the First Defendant and the warranty did not imply an absolute liability on the part of the First Defendant and/or its insurance company.*

5. AD PARAGRAPH 5 AND 6

For the reasons pleaded as aforesaid, it is denied that the terms pleaded herein were indeed terms and conditions of an agreement concluded between Plaintiff and First Defendant for this particular consignment.

6. *AD PARAGRAPH 7*

Save to admit that on or about 18 April 2005, the First Defendant's Cargo Trucking Services were engaged as a broker by Plaintiff and/or Second Defendant to facilitate an agreement of transport between Plaintiff and Second Defendant for a consignment of three pieces of machinery from Johannesburg to Durban, the contents hereof are denied.

7. *AD PARAGRAPH 8*

Save to admit that the First Defendant merely acted as broker in contracting the Second Defendant to transport goods for the Plaintiff, the contents hereof are denied.

8. *AD PARAGRAPH 9*

First Defendant takes note of the allegations herein.

9. *AD PARAGRAPH 10*

9.1 Each and every allegation herein is denied as if specifically mentioned and the Plaintiff is put to the proof thereof.

9.2 In amplification of the aforesaid denial, the First Defendant pleads that the Second Defendant herein de facto transported the goods.

9.3 The damage to the goods was caused by the sole negligence of the Second Defendant by one of its employees, such employee at the time acting within the course and scope of his employment with the Second Defendant by:

9.3.1 attempting to take over another vehicle when it was unsafe or inopportune to do so;

9.3.2 driving at an excessive speed under the circumstances;

9.3.3 failing to keep a proper look-out;

9.3.4 failing to apply the brakes of the vehicle timeously;

9.3.5 failing to exercise the degree of diligence and care required of the class of vehicle in question driven by such employee in overtaking a vehicle of another class towing at least one trailer, at night;

and so acting loss of control of the vehicle driven by him, causing the vehicle to roll and thereby causing damage to the goods."

[6] The second defendant, on its turn, pleaded to the plaintiff's allegations as set out above as follows:

"*4.* *Ad Paragraphs 4, 5, 6 and 7*

The Second Defendant:

4.1 *is unaware of;*

4.2 *accordingly denies each and every allegation herein specified and puts the Plaintiff to the proof thereof.*

5. *Ad Paragraph 8*

The Second Defendant:

5.1 *admits that the First Defendant engaged it to perform cargo trucking services;*

5.2 *otherwise does not admit that:*

5.2.1 *the said services were rendered in respect of the goods alleged in the Plaintiff's claim;*

5.2.2 *the terms of the contract between it and the First Defendant constituted a sub-contract under which the principal was the Plaintiff;*

5.2.3 *the document evidenced by Annexure "POC1" was applicable to the consignment for which the Second Defendant performed tracking services.*

6. *Ad Paragraph 9*

The Second Defendant denies these allegations.

7. *Ad Paragraphs 10 to 12*

These allegations:

7.1 refer solely to the First Defendant and the Second Defendant is not called upon to traverse the same;

alternatively to paragraph 7.1:

7.2 are denied.

8. Ad Paragraph 14

The Second Defendant pleads that in the event of it being proved that the contract between it and the First Defendant constituted a sub-contract, denies these allegations.

9. Ad Paragraph 15

The Second Defendant, repeating its denials above, denies each and every allegation herein contained and puts the Plaintiff to the proof."

From the above it is plain that the plaintiff's above quoted particulars of claim constitute its Claim A. The alternative claim, Claim B, contained in paragraphs 13 to 17, was against the second defendant.

[7] Some background of the parties is necessary. The plaintiff is based in Amsterdam. It provides, *inter alia*, scheduled and charter cargo services worldwide. The first defendant, *inter alia*, provides road feeder services to the coastal areas through its trucking network between OR Tambo International Airport, Johannesburg, Cape Town and Durban International Airports. It is based in Kempton Park. The second defendant, a close corporation, which traded as Pro-Africa Trucking conducted services, *inter alia*, as Cargo Carriers and was based in Durban, KZN.

COMMON CAUSE FACTS

[8] It is common cause that the second defendant has since been liquidated. As a consequence, at the commencement of the trial, the plaintiff abandoned Claim B against the second defendant. The *locus standi* of the plaintiff in the trial, which was in issue on the pleadings, was also admitted when the trial commenced. It is further not in dispute that the damaged goods in question consisted of three pieces of heavy emulsifying machinery ("*the goods*"). The goods originated from Vienna and were transported from there to their intended destination, Durban, KZN, under an air waybill issued by the plaintiff. The shipper of the goods was Kemira Chemie, who consigned them to Paperkem (Pty) Ltd, in terms of the air waybill from Vienna to Durban, KZN. It was also not in dispute that the plaintiff was responsible, under the air waybill, to transport the goods from Vienna to Durban, KZN. On the pleadings, it is further not in dispute that the first defendant received from the plaintiff the goods in good condition at the OR Tambo International Airport, on 18 April 2005. The pleadings also reveal that whilst in transit, the goods, conveyed in a truck of the second defendant, were damaged in a collision at Harrismith, near Durban, KZN. The police accident report and sketch suggest that the collision was due solely to the negligence of the second defendant's driver. The first defendant also relies on this allegation on the pleadings. The fact that the goods were damaged and did not reach their destination in their original good condition when collected at the OR Tambo International Airport, Johannesburg, was not in dispute. Finally, as regards common cause facts, in its plea, as quoted above, the first defendant admitted that the plaintiff did

from time to time engage the first defendant's cargo trucking services in respect of goods for and on behalf of the plaintiff at the first defendant's usual charges. This seems to have been the position prior to the incident in question. Based on all the above common cause facts, the only crisp issue for determination remains the question whether or not there was an agreement in place between the plaintiff and the first defendant in regard to the conveyance of the goods under discussion on 18 April 2005 and if so, whether the first defendant is liable to the plaintiff for the damaged goods.

THE EVIDENCE OF THE PLAINTIFF

[9] I deal with the evidence. Two witnesses testified on behalf of the plaintiff. They are Ms A J Wagenaar ("*Wagenaar*") and Mr M Klijnstra ("*Klijnstra*"). For the defendant Mr B Woolley was the only witness. Wagenaar testified that she was employed by the plaintiff as a bookkeeping and administrative clerk and customer services agent from 2004. She had dealings with the first defendant regarding the transaction under discussion. In the course of her duties, she was familiar with Annexure "POC1" to the particulars of claim. Prior to the damage to the goods, on 18 April 2005, Wagenaar would have dealt with Ms Y Vos of the first defendant regarding the particular consignment. In arranging with Vos for the goods to be transported from OR Tambo International Airport, Johannesburg, Wagenaar would have mentioned that the goods consisted of three pieces of machinery, the air waybill number, the weight and the destination. Due to the unusual size of the goods, the first defendant was expected to arrange a truck outside their

normal scheduled trucks, i.e. an *ad hoc* truck, to accommodate the goods. Wagenaar asked Vos for a quotation in this regard. Wagenaar was not told by Vos that the services of an independent sub-contractor, namely the second defendant, would be engaged. This was so since it was not the manner of conducting their business, according to Wagenaar. The quotation requested from Vos would have been dispatched by e-mail to Wagenaar, and approved by her boss, Klijnstra. Wagenaar conducted business deals with the first defendant almost on a daily basis. She also on occasion dealt with Ms Lisa Tamkei of the first defendant.

[10] Wagenaar could not recall exactly receiving from Vos an e-mail concerning insurance cover for the goods. It was not part of her job description to deal with insurance matters, but it was that of Klijnstra. She had seen Annexure "POC1" to the particulars of claim whereafter the annexure was filed. After concluding the arrangements with Vos for the transport of the goods, Wagenaar was subsequently contacted by the first defendant and informed that the goods were damaged in a collision. Prior to asking Vos for a quotation, Wagenaar testified that she received a booking sheet from the plaintiff in Amsterdam about the goods.

[11] In cross-examination, Wagenaar was adamant that she recalled the consignment of the goods in question. She had received a notification from the plaintiff in Amsterdam, and as usual, contacted the first defendant to do the transfer of the shipment mentioned in the manifest. She sent an e-mail to the first defendant containing details of the goods. She conceded readily that

the goods presented an unusual shipment due to its size, and outside the normal scheduled trucks of the first defendant. She expected the first defendant to secure a truck outside its scheduled fleet. Wagenaar was not aware of the actual contractual relationship between the plaintiff and the first defendant, which did not fall within her scope of duties. During her tenure at the plaintiff, which was from 2004 to 2009, she only used the services of first defendant to transport Cargo, and no other entities.

[12] Prior to dealing with the evidence of Klijnstra, it is necessary to reproduce in full the contents of Annexure "POC1" to the plaintiff's particulars of claim, which I do hereunder:

"***ACR***

AIRLINE CARGO RESOURCES

Martinair Cargo CARGO TRUCKING PROPOSAL

SERVICE

ACR's trucking network covers Johannesburg, Cape Town, Durban and Port Elizabeth. JNB/DBN/JNB operates on day 1,2,3,4,5/7. JNB/CPT/JNB operates on day 1,3,5. JNB/PLZ/JNB operates on day 1,3,5. All the trucks utilized are 14M closed trailers, which are locked with a security bar and sealed, using numerical seals that checked and verified at station of origin and destination. The trailers are equipped with air-cushioned suspension systems needed for fragile and vibration sensitive cargo. All trucks are refrigerated to accommodate the perishable market when required. The trucks are fitted with roller-bed system for ease of loading unitised cargo and to minimise transit period at ground handling stations.

CARGO HANDLING

All cargo is checked upon acceptance for any irregularities and cross-checked according to documentation. Cargo is loaded in accordance IATA handling procedures. All shipments are documented during loading and manifested for transport. Any irregularities, such as

damages, missing cargo or missing documentation, will be reported to Martinair Cargo.

ULD CONTROL

Any ULD's received from the carriers are monitored, recorded and returned as soon as possible. Movement of the ULD's within our network are tracked, therefore at any given time we are able to account for the whereabouts of the ULD's. The designated ULD yard is monitored and controlled by CCTV surveillance cameras.

ACR OFFICES

Johannesburg
Tel: 27 11 390-2851/2
Fax: 27 11 390-2840
Lisa Ho-Ming

Durban
Tel: 27 31 462-9984/9
Fax: 27 31 462-9891
Udo Moss

Cape Town
Tel: 27 21 935-1341/1343
Fax: 27 21 935-1359
Jeff Gaitskill

Port Elizabeth
Tel: 27 41 481-1138
Fax: 27 41 581-1045
Paul Hand

HAZARDOUS CARGO

Hazardous cargo packed in accordance with IATA specifications is acceptable on all our routes. All trucks carry the necessary permits allowing transportation dangerous goods. All Truck Supervisors are fully qualified in IATA DGR acceptance, which have been trained by FAA and CAA Accredited DGR Training companies.

SECURITY

All our handling centres are equipped with 24Hr CCTV. The Johannesburg handling centre has a security guard on duty in the warehouse 24hrs. Cape Town, Durban and Port Elizabeth are linked to armed response for additional security measures. The trucks are all fitted with satellite tracking systems, allowing ACR to be able to find out the location of the trucks at any given time. Before departure the trucks are sealed with a security seal, which is checked upon arrival at the final destination to ensure the load has not been tampered with. In addition to this a steel bar fitted across the doors of the trailer and locked in place.

INSURANCE / LIABILITY

ACR carries insurance to cover any loss, damage, delay or pilferage incurred whilst goods are in transit. ACR is insured for ZAR5,000,000.00 per load on the trucks.

CAPACITY

ACR can allot capacity to Martinair Cargo on a regular basis subject to confirmed loads. Should Martinair Cargo require additional capacity we would be able to arrange ad-hoc trucks given sufficient notice from the airline. Any cargo which is not forwarded on a specified truck for reasons outside ACR's control this cargo will be given priority on the following scheduled truck. Should the cargo be in great demand at final destination then a dedicated or an ad-hoc truck could be put on the route. At all times Martinair Cargo's product times will be adhered to if it is within ACR's control.

TRUCKING SCHEDULES

ROUTING	DAYS OF OPERATION	DEPART	ARRIVE	DURATION
JNB-DUR	1,2,3,4,7	22H00	06H00*	8hrs.
DUR-JNB	1,2,3,4,5	22H00	06H00*	8hrs.
JNB-CPT	1,3,5	20H00	15H00*	19hrs.
CPT-JNB	1,3,5	20H00	15H00*	19hrs.
JNB-PLZ	1,2,3,4,5	18H00	10H00*	16hrs.
PLZ-JNB	1,2,3,4,5	18H00	10H00*	16hrs.
JNB-ELS vin PLZ	As required			
ELS-JNB vin PLZ	As required			

*arrival following day

*JNB-DUR Day 7 Departs 17h00 ETA 01h00**

CUSTOMS DOCUMENTATION

For RIB documentation processed by ACR offices a fee of ZAR75.00 will be billed.

SERVICE QUALITY

ACR trucks operate on a strict schedule, whether the truck has a full load or not. All departure and arrival times are maintained. ACR is represented at all branches with its own handling facilities and staff.

EDI LINKS

ACR has recently linked tot the Customs EDI network. ACR is connected at all branches with internet and e-mail access. ACR has the CARGO 1 system at all branches which allows for processing FFM's etc.

DOCUMENTATION

Customs documentation is processed in our offices and strict records are kept. Trucking manifests are prepared by our staff and can be forwarded to the airline. For international shipments transiting JNB onwards to its final destination, the original International Martinair Cargo Documentation will be sufficient.

INVOICING

Invoicing for trucking will relate only to the transporting by road of Martinair Cargo's Airfreight.

An itemised Invoice will be issued for all services administered by ACR.

All Charges Collect Schedules will be submitted to Martinair Cargo for itemised billing purposes.

ENVIRONMENTAL POLICY

All trucks are serviced and maintained according to strict maintenance program set aside by the Health Authorities. Trailers are fumigated, cleaned and sterilised once a month and certificated once a year by the relevant government health departments."

The plaintiff relies on this document for the contention that there was a partly written agreement between the parties when the goods were damaged. The plaintiff also relies on the discussions between members of the plaintiff and the defendant for the contention that there was an oral agreement between the parties.

[13] Klijnstra testified that he was employed by the plaintiff as Regional Director, Cargo Sales for South Africa. The business dealings with the first defendant commenced in 2004 at the time when the services of the first defendant were used to transport cargo, initially all over South Africa. Later the business dealings extended to cargo transferred off inbound Martinair Flights onto the first defendant's trucks. The business dealings were put

together in a proposal document, Annexure "POC1", after discussions with the first defendant, namely with Lisa Tamkei. The latter was the Road Field Service Division Manageress of the first defendant.

[14] Klijnstra testified that the business dealings between the plaintiff and the first defendant commenced in 2004 which was pursuant to the proposal document, Annexure "POC1", quoted above. There were detailed discussions and exchanges between Klijnstra and Lisa Tramkei of the first defendant at the time. These included service conditions, scheduling, pricing, handling of airline equipment, special loads, insurance cover, vehicle security, customs, invoicing and contract details. Klijnstra said that the plaintiff engaged doing business with the first defendant on the basis of the proposal document, Annexure "POC1". The plaintiff was satisfied that the first defendant provided all the necessary care for their cargo to arrive at the various destinations undamaged.

[15] What is of significance, and relevant to part of the first defendant's defence are the clauses dealing with "*insurance/liability*" and "*capacity*". These clauses require emphasis and repeating. The "*insurance*" clause reads:

> "*ACR* [the first defendant] *carries insurance to cover any loss, damage, delay or pilferage incurred whilst goods are in transit. ACR is insured for ZAR5,000,000.00 per load on the trucks.*" (my insertion)

The "*capacity*" clause provides:

> *"ACR can allot capacity to Martinair Cargo* [the plaintiff] *on a regular basis subject to confirmed loads. Should Martinair Cargo require additional capacity we would be able to arrange ad-hoc trucks given sufficient notice from the airline. Any cargo which is not forwarded on a specified truck for reasons outside ACR's control this cargo will be given priority on the following scheduled truck. Should the cargo be in great demand at final destination then a dedicated or an ad-hoc truck could be put on the route. At all times Martinair Cargo's product times will be adhered to if it is within ACR's control."* (my insertion)

These clauses, especially the one dealing with insurance, put Klijnstra at ease that it was safe to do business with the first defendant.

[16] At the outset of his cross-examination, Klijnstra testified that Annexure "POC1" was provided to the plaintiff by the first defendant. A version, which was not pleaded, by the first defendant, was then put to Klijnstra. This was that the proposal document merely described the services which the first defendant could render as a transport company, and airlines, such as British Airways and Lufthansia, concluded formal agreements with the first defendant pursuant to the proposal document. However, this version, as stated later, was watered down by the first defendant's witness, Woolley. Klijnstra was insistent that the salient features of the proposal document were applied to the business dealings between the parties. The business was conducted on the basis, *inter alia*, that the cargo of the plaintiff transferred to the first defendant would be handled reasonably, arriving in the same condition as when received, and that the first defendant possessed a fully paid up insurance policy to cover plaintiff's cargo to the trucks to the value of R5 million, including cargo transported by *ad hoc* trucks. Klijnstra disagreed with the first defendant's counsel that the proposal document did not constitute a formal agreement between the parties. He countered that there was an

understanding between the parties based on the document and that business between the parties had been conducted in terms of the document. The fact that the first defendant used an *ad hoc* truck on 18 April 2005 was immaterial. Klijnstra was not involved at all with the second defendant.

[17] In regard to the collision during which the goods were damaged on 18 April 2005, Klijnstra testified that he carried no knowledge on how the accident occurred. He disagreed that the first defendant was absolved from liability on the basis that the first defendant was not involved in the collision. According to him, "*the paperwork, the transfer manifest confirms that the cargo was in the possession of as, ja prior to the accident and had not been delivered after the accident. So it was still in transit under the control of ACR* ..." Klijnstra did not discuss with Woolley of the first defendant about the consignment of the goods under discussion. At the time of the incident under discussion, i.e. 18 April 2005, Klijnstra testified that the first defendant was the sole feeder service supplier to the plaintiff. However, when Klijnstra first became aware in October 2006 that the first defendant's insurance cover for cargo was on request, did not cover *ad hoc* trucks, he immediately suspended all transfers of cargo to the first defendant. At the time of his testimony, Klijnstra was no longer employed by the plaintiff.

[18] What was also of significance is that Klijnstra was never challenged on his discussions and dealings with Lisa Tamkei. Similarly, it was never put to him that his dealings with Lisa Tamkei were all subject to a "*formal agreement*", in the sense referred to by Woolley in his evidence. The rest of

the cross-examination of Klijnstra was, in my view, irrelevant to the issue to be determined in this trial.

THE EVIDENCE OF THE FIRST DEFENDANT

[19] Mr Woolley, the Managing Director of the first defendant, testified. The purpose of the proposal document, Annexure "POC1" was merely a proposal to offer first defendant's services to prospective clients. The document was specially prepared for the plaintiff but they would have done the same for other airlines, such as Swiss Air Cargo. Most of the trucks and trailers referred to in the proposal document referred to the first defendant's fleet of motor vehicles.

[20] An *ad hoc* truck, according to Woolley, is a truck that was not scheduled in which event the first defendant would act as a broker to lease a truck suitable for any special cargo arriving in the country. He confirmed that the first defendant and the plaintiff had been doing business with each other from about 2004 until August 2006. He was, however, not directly involved in the arrangement of the *ad hoc* truck on 18 April 2005, but Lisa Tamkei was. He did not know much about the second defendant, although his company had been doing business with the second defendant from about February 2004.

[21] The impression conveyed by Woolleys' evidence was that his involvement in the matter under discussion was rather superficial and minimal. He left matters to Lisa Tamkei. He could not produce any documentation to substantiate his claims that similar proposals, as Annexure "POC1", were addressed to other cargo entities. He conceded in cross-examination that in circumstances where the first defendant conveyed cargo, it would exercise reasonable care in respect of cargo entrusted to it, and that such cargo would also be delivered at its intended destination undamaged. The terms and conditions contained in Annexure "POC1" did not specify or disqualify *ad hoc* trucks. On several occasions in cross-examination, Woolley could not comment on certain propositions put to him. He also contradicted himself on certain aspects of his evidence. Overall, he was not an impressive witness. He had no knowledge of the circumstances surrounding the collision whereat the goods were damaged.

[22] As set out in the particulars of claim, the plaintiff alleged that it and the first defendant entered into a partly oral and partly written agreement in April 2005. The written portion of the alleged agreement relied upon is the proposal document annexed to the particulars of claim. The material terms of the alleged agreement are set out earlier in the judgment. The *onus* of proof rested on the plaintiff. See for example, *Afrox Healthcare Bpk v Strydom* [2002] 4 All SA 125 (SCA). In my view, in the light of the common cause facts enumerated above, the matter is capable of easy resolution in favour of the plaintiff.

[23] The proposal document on which the plaintiff relies was addressed specifically to the plaintiff by the first defendant. It had been discussed extensively by the parties. As seen from the document, it has the plaintiff's name at the top. It consists of a number of pages. It contains several terms, in particular, terms about insurance/liability and capacity. In response to the proposal document and the extensive discussions, particularly between Klijnstra and Lisa Tamkei of the first defendant, the parties engaged in doing business with each other without any murmur. The purpose of sending the proposal document to the plaintiff, according to Woolley, was to show the plaintiff what services the first defendant offered. In *Jurgens and others v Volkskas Bank Ltd* 1993 (1) SA 214 (A), which concerned a surety contract, at pp 218-219, Hoexter JA said:

> *"An offer is a manifestation of the offeror's willingness to contract, made with the intention that it shall become binding as soon as it is accepted by the offeree. It is trite that an offer cannot be accepted unless and until it has been brought to the attention of the offeree ..."*

Woolley, the Managing Director of the first defendant for some 18 years, although trying to downplay the importance and weight of the proposal document, was, however, constrained to concede that what was contained in any formal agreement would be consistent with what was contained in the proposal document (see record p 18 lines 2-10).

[24] In addition, in the light of the undisputed discussions between Klijnstra and Lisa Tamkei when the proposal document was addressed to the plaintiff, it boggles the mind why Lisa Tamkei did not draw the attention of Klijnstra to

the fact that the proposal document, as well as their discussions, required to be formalised. On the evidence, Lisa Tamkei was a crucial witness, yet she was not called to testify. As argued by counsel for the plaintiff, she was the port of first call in dealing with the plaintiff at the inception of the parties' dealings in 2004, and before any business was transacted. Klijnstra was never challenged on his discussions and dealings with Lisa Tamkei, and it was never put to him that his dealings with Lisa Tamkei were all subject to a formal agreement as suggested by Woolley in his testimony. Lisa Tamkei was subpoenaed by the first defendant. She was available at court, but released without testifying. In this regard, the headnote in *Elgin Fireclays Ltd v Webb* 1947 (4) SA 744 (A) is apposite:

> "*It is true that if a party fails to place the evidence of a witness, who is available and able to elucidate the facts, before the trial Court this failure leads naturally to the inference that he fears that such evidence will expose facts unfavourable to him. But the inference is only a proper one if the evidence is available and if it will elucidate the facts.*"

In the context of the present matter, the uncontroverted evidence of Klijnstra must be accepted as credible. An adverse inference against the first defendant for failing to call Lisa Yamkei as a witness, is fully justified.

[25] I turn to the interpretation of the provisions contained in the proposal document, based on the discussions between Lisa Tamkei and Klijnstra at the relevant time. The meanings of the provisions are clear, and are to be construed in their context in the light of the document as a whole. In *Coopers and Lybrand and Others v Bryant* 1995 (3) SA 761 (A) at 767 (E):

> *"Various canons of construction are available to ascertain their common intention at the time of concluding the cession. According to the 'golden rule' of interpretation the language in the document is to be given its grammatical and ordinary meaning, unless this would result in some absurdity, or some repugnancy or inconsistency with the rest of the instrument."*

Both Klijnstra and Woolley who testified in regard to the relevant provisions of the proposal document suggested any ambiguity and uncertainty in their meaning. The plaintiff's cause of action as pleaded, and based on the proposal document and discussions, is simply that there was a partly oral and partly written agreement prior to April 2005 to conduct business between the parties. On the overwhelming probabilities, based on the evidence, and the discussions between the parties and the proposal document, the plaintiff's version is favourable and more probable. The contentions of the first defendant as advanced by Woolley are far-fetched and improbable. The finding is that there was indeed an agreement between the parties. They conducted business with each other from 2004. Alternatively, there was a tacit agreement between them.

[26] It is plain, having regard to the provisions in the proposal document, that the parties intended it to create legal relations between them. Significantly, Woolley could not point to any provision whatsoever what was absent from the proposal document and the discussions between Klijnstra and Lisa Tamkei which needed to be included in any formal agreement. Nothing more was necessary. See *Pitout v North Cape Livestock Co-operative Ltd* 1977 (4) SA 842 (A).

[27] In regard to the events of 18 April 2005, there is equally no doubt that the first defendant is liable to the plaintiff for the damages suffered as a result of the goods being damaged in transit. It is common cause that the first defendant took possession and control of the goods at the OR Tambo International Airport, in an undamaged condition. From the common cause facts, the first defendant sub-contracted its cargo trucking services in respect of the goods to the second defendant. The goods did not arrive at their destination in an undamaged condition. As a consequence, the plaintiff alleges that in breach of the agreement, the first defendant failed to exercise reasonable care in respect of the goods entrusted to it; the first defendant failed to procure the delivery of the goods to their intended destination in the same condition in which they were received; and that the first defendant has breached the warranty by failing to ensure the goods against loss or damage incurred whilst in transit.

SOME LEGAL PRINCIPLES

[28] The legal principle attaching liability to the first defendant has been set out in numerous case law and other authorities. In *Hall-Thermotank Africa Ltd v Prinsloo* 1979 (4) SA 91 (T) at 93H, King J said:

> "*The absolute liability of a carrier in our law arose originally from the praetor's edict, and has been followed consistently in several cases. The only question in law as to whether there is an absolute liability or not, is whether the carriage is for reward, or is gratuitous. Once the carriage is for reward, there is an absolute liability on the part of the carrier to ensure that the goods which he receives are delivered undamaged. If they are delivered in a damaged condition, he must compensate therefor, as an absolute liability, unless he can show (and*

the onus in this regard is on him) that the damage occurred through damnum fatale or vis major; in other words, that there was a superior force over which he had no control, which caused the loss, or the loss was inevitable and unavoidable from the point of view of a reasonable man."

See also *Alex Carriers (Pty) Ltd v Kempston Investments (Pty) Ltd* and Another1998 (1) SA 662 (E) at 678F-J, and *Stocks & Stocks (Pty) Ltd v TJ Daly & Sons (Pty) Ltd* 1979 (3) SA 754 (A) at 761H-762. In the instant matter, the carriage was undoubtedly for reward. The agreement was between the plaintiff and the first defendant only. The fact that the goods were damaged in transit due to the negligence of the driver of the second defendant's truck, is in my view, irrelevant and immaterial to the plaintiff's cause of action in the circumstances of this matter.

[28]

28.1 In *The Law of Shipping and Carriage in South Africa* by B R Bamford, 3ed, at 112, under the heading "*Liability of the Carrier*", the following is said:

> "*A carrier is liable to the consignee for any damage to the contractual goods – that is, the consignee, on proof of damage, may recover damages without the necessity of establishing how the loss was caused and, more particularly, without having to prove negligence on the part of the carrier or his servants or agent. The consignee must, however, prove that the damage occurred while the carrier's responsibility still subsisted.*"

The footnote to this quotation, with reference to case law, makes it clear that it is no defence for the carrier to show that he was in no way negligent. See also LAWSA, 2nd ed, Volume 2 Part 1, p

322, para 599. See also Wille's *Principles of South African Law*, 9ed, pp 972-975.

28.2 In *Wilson v New Zealand Express Co. Ltd.* (No 2) 1924 NZLR 465 at 467, the principle of liability of a career was described in the following terms:

> "*It is clear, however, in a case such as the present that liability is founded on contract, for the real complaint is the breach of the contract to deliver the furniture and effects to the plaintiff at Whakatane : Bayliss v. Lintott(3); Fleming v. Manchester and Sheffield Railway Co.(4). The defendant undertook for reward to carry the furniture and effects from Oamaru to Whakatane, and was bound to exercise ordinary care in the custody of the goods and in their conveyance to and delivery at their place of destination : Wyld v. Pickford(5). The responsibility for the exercise of that care rests, I think, on the defendant throughout the carriage of the goods, whether they remain in the hands of the defendant's own servants or pass into the hands of a subcontractor. If the defendant entrusts the carriage of the goods to a subcontractor, and they are lost through the negligence of that subcontractor or his servants, the defendant is liable, I think, because there has been a breach of the defendant's undertaking that ordinary care will be exercised in the carriage of the goods.*"

In the instant matter the submissions and reliance by counsel for the first defendant on *Chartaprops 16 (Pty) Ltd and Another* 2009 (1) SA 265 (SCA), were misplaced on the facts of the present matter.

THE VARIOUS DEFENCES RAISED BY THE FIRST DEFENDANT

[29] The first defendant, in its plea which was amended several times, has raised several defences. These are summarised as follows. That although the first defendant admits that the plaintiff from time to time did engage the first defendant's cargo tracking services in respect of the goods and cargo for and on behalf of the plaintiff at the first defendant's usual charges, no agreement existed between the parties; the proposal document does not constitute an agreement; in the event of the proposal document constituting an agreement, then such agreement would be applicable only to the first defendant's fleet of trucks as specified in the proposal document; the consignment in respect of the goods was an *ad hoc* agreement for which a separate vehicle outside of the first defendant's fleet would be contracted and quoted for; insofar as the proposal document is found to constitute an agreement, that it was a further express, alternatively implied, further alternatively, tacit term of the agreement that the insurance warranted by the first defendant would not cover any loss or damage incurred whilst the goods were in transit if such loss or damage was not attributable to any fault on the part of the first defendant and the warranty did not apply an absolute liability on the part of the first defendant and/or its insurance company; the first defendant was engaged as a broker by the plaintiff and/or second defendant to facilitate an agreement of transport between the plaintiff and the second defendant for consignment of goods from Johannesburg to Durban; and finally, the damage to the goods was caused by the negligence of the second defendant.

[30] I have already found that there was an agreement between the parties, and that the first defendant ought to be held liable to the plaintiff for the damaged goods. I have also found that the negligence of the driver of the truck of the second defendant does not affect the plaintiff's cause of action. In regard to liability, which I have also already dealt with, I may add that Woolley in his evidence readily conceded that in the circumstances where the first defendant conveyed cargo, it would exercise reasonable care in respect of cargo entrusted to it. Further that such cargo would also be delivered at its intended destination in the same condition in which it was received. These concessions showed unambiguously the tacit term of the agreement relied on by the plaintiff in para 5.3 of the particulars of claim. The concessions are also implied terms of any contract of carriage. See in this regard *Stocks & Stocks (Pty) Ltd (supra)*.

[31] The defence that in the event of the proposal document constituting an agreement, then such agreement would be applicable only to the first defendant's fleet of trucks as specified in the proposal document, is equally without merit. It is plainly disingenuous. The provisions contained in the proposal document, individually examined and analysed, apply also in respect of *ad hoc* trucking arrangements and shipments. In cross-examination, when asked, about the first defendant's trucking network fleet, Woolley conceded that the proposal document also mentions *ad hoc* trucks. In the proposal document, under the heading "*CAPACITY*" *ad hoc* trucks are provided for as follows:

> "*Should Martinair Cargo require additional capacity we would be able to arrange ad-hoc trucks given sufficient notice from the airline.*"

From this, this is plain that the reliance by the first defendant on the allegation that *ad hoc* trucks, whether provided by the first defendant itself or the second defendant were not catered for, is without merit at all. The first defendant, in any event, invoiced for all trucking services, whether in respect of normal shipments or *ad hoc* shipments.

[32] The defence that the first defendant at the time was engaged as a broker by the plaintiff and the second defendant, requires very little consideration. There can be no suggestion at all that the first defendant acted as a middleman on behalf of the plaintiff. The first defendant and the plaintiff were co-principals in contract. The contention is not supported by any evidence of whatsoever nature. The only person who could possibly have shed some light on this allegation was Ms Lisa Tamkei. As stated earlier in the judgment, she was not called to testify in spite of her availability. The defence must be rejected.

[33] The defence advanced that if the proposal document is found to constitute an agreement, that it was a further express, alternatively implied, or tacit term that the insurance warranted by the first defendant would not cover any loss or damage incurred whilst the goods were in transit, for reasons alleged by the first defendant, require some consideration. It boggles the mind why the first defendant would provide insurance liability cover but then want to limit the applicability thereof in the first place unless this was made

expressly clear. The term can also not be said to be tacit as there would have to be a meeting of the minds. Not only is the term sought to be imputed in direct conflict with the express terms of the proposal document, but it was also brought rather belatedly. See, for example, *Roberts Construction Co Ltd v Dominion Earth-works (PTY) Ltd and Another* 1968 (3) SA 255 (A). The first defendant's original plea did not contain such a defence. Furthermore, as argued by counsel for the plaintiff, the defence seems to be based on the common law. See *Prinsloo v Venter* 1964 (3) SA 626 (OPD) at 627E-F. However, the common liability of the private carrier in regard to the goods conveyed may be modified or expanded by agreement between the carrier and the consignor or consignee. As stated earlier in the judgment, the alleged negligence of the driver of the second defendant's truck is irrelevant to the plaintiff's cause of action. The first defendant's undertaking as warranted in clear and ambiguous language, provided that it carried insurance to cover "*any loss incurred whilst the goods are in transit*". The defence is therefore bereft of any merit. The difficulty facing the first defendant in regard to all the defences raised is that no evidence at all was led in regard thereto. The uncontested evidence of Klijnstra was that the first defendant furnished him with a certificate of insurance on two separate occasions, namely the certificate for 2004, and the one for the year 2005. On a proper interpretation of the proposal document, the clear meaning is that the insurance was in place and that the first defendant was insured for R5 million per load on the trucks.

CONCLUSION

[34] To sum up. On the above facts, I am satisfied that the plaintiff has succeeded, on a balance of probabilities, to prove the liability of the first defendant for the damaged goods. On either of the breaches contended for by the plaintiff, the first defendant has breached the agreement. The other defences raised by the first defendant, such as the rejection by the plaintiff's insurer of the claim in regard to the goods in question, are red herrings. It follows that the issues contained in paras 4 to 10 of the plaintiff's particulars of claim, as amended, and regarding the liability of the first defendant, must be determined in favour of the plaintiff. It is unnecessary to make any determination on the plaintiff's claim against the second defendant since the plaintiff has abandoned such claim. There is no reason why the costs should not follow the result.

ORDER

[35] In the result the following order is made:

1. The first defendant shall be liable for the proven or agreed damages of the plaintiff arising from the damage of the goods on 18 April 2005.

2. The plaintiff's quantum of damages is postponed *sine die* for later determination.

3. The first defendant shall pay the plaintiff's costs of suit.

D S S MOSHIDI
JUDGE OF THE SOUTH GAUTENG
HIGH COURT, JOHANNESBURG

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DATE OF HEARING	7 FEBRUARY 2012
DATE OF JUDGMENT	4 MAY 2012

SUMMARY

Contract – liability for damage to goods in transit – public carrier by road – plaintiff contracted with first defendant to transport goods from OR Tambo International Airport to Durban – first defendant in turn sub-contracting with second defendant to transport goods – goods damaged in motor collision – plaintiff claiming damages and alleging contract of carriage – carrier disputing contract and averring in the alternative that goods damaged by negligence of driver of second defendant – the first defendant held liable – adverse inference drawn against first defendant for failing to call an available witness.