REPUBLIC OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT, JOHANNESBURG

CASE NO: 39092/09

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

22/10/2013
DATE

SIGNATURE

In the matter between:

RELIANT INSURANCE BROKERS (PTY) LTD **Plaintiff**

And

INDEPENDENT FREIGHT SERVICES **Defendant**

J U D G M E N T

MATHOPO J

[1] This is an action instituted by the plaintiff against the defendant based on the alleged breach of an agreement concluded between itself and the defendant in terms whereof the defendant undertook to transport certain manganese for the plaintiff to Durban.

[2] During the discussions leading to the agreement the plaintiff was represented by Mr Kevin Thysse (**"Thysse"**) and the defendant by Mr Brian Brombacher ("Brombacher").

[3] In the original particulars of claim dated the 27 September 2009, the plaintiff asserts that the agreement was oral. In the subsequent amendments effected during November 2009 and October 2011, the allegation was made that it was a tacit or implied term of the agreement that the defendant would pay for the containers necessary to be able to transport the manganese for its depot in Pretoria to Durban.

[4] The plaintiff has alleged that the defendant repudiated the agreement in the following respects:-

4.1 The defendant failed to arrange for the supply of the empty containers necessary to transport the cargo.

4.2 The defendant failed to timeously load the containers.

4.3 The defendant failed to transport the cargo.

4.4 The defendant's attorneys (Scarrott) sent a letter on 26 August 2009 claiming that the plaintiff was indebted to the defendant in the sum of R798 561-39 together with storage costs and demanding the removal of the cargo within 14 days.

[5] The plaintiff further alleges that as a result of the defendant's repudiation the plaintiff suffered damages in the sum of R768 640-58 in respect of additional costs it would not have incurred had the defendant performed.

[6] The defendant denied the terms of the agreement as alleged by the plaintiff and in particular denied that the defendant was obliged to source the containers and specifically further denied that it was an implied, alternatively tacit term of the agreement that the defendant would pay for the transport of the containers.

[7] The defendant further averred that the agreement was repudiated by the plaintiff in the following respects:

7.1 By failing to co-operate with the defendant by making the containers available at a private depot in Johannesburg 7-10 working days before stacks opened in Durban; and

7.2 Failed to co-operate with the defendant by "rolling" the shipping booking on the vessel "Bahia Grande" to a new vessel and providing the Defendant with the new shipping details.

[8] It is the plaintiff's case that it complied with its obligations in terms of the agreement and that the defendant repudiated the agreement by sending the plaintiff a letter on the 26 August 2009 from its attorney alleging that the plaintiff is indebted to the defendant in the sum of R798 561, 89 which amount included the storage costs, disbursements and furthermore demanded removal of the cargo within 14 days. It is the plaintiff's case further that it accepted the defendant's repudiation of the agreement and paid the sum of R798 561, 39 "under protest" to mitigate its damages.

[9] On the other hand, the defendant denies that it repudiated the agreement and averred that the repudiation occurred as a result of the plaintiff's conduct.

Issues

[10] The principal issue between the parties revolve around the exact terms of the agreement dated 20 July 2009 and whether the defendant, by letter dated 26 August 2009 from its attorneys repudiated the agreement or not.

[11] To prove its case, the plaintiff called Mr Kevin Thysse and Gambier and the defendant called Mr Gumanski.

Evidence of the plaintiff

[12] The plaintiff called Kevin Thysse ("Thysse") who testified that the business of the plaintiff is insurance brokering but it also does a bit of commodity brokering as well.

[13] Thysse testified that the plaintiff was in the process of bringing manganese from Zambia and exporting it to its partners, Golf Mining and Mineral Co. Ltd (**"Gold Mining"**), based in Oman in the Middle East.

[14] As the plaintiff was specifically looking for a company to handle the cargo from South Africa to China on the basis of a free on board facility (FOB). This would involve clearing the cargo at the border into South Africa. The defendant was approached because of its bonded warehouse. It was a material term of the agreement that the defendant would pack the manganese into containers and ship it to Durban into what is commonly known as Stacks, which is the port for loading onto the ship.

[15] Thysse explained that free on board meant that the plaintiff would supply the shipping line and the shipping line would normally supply the container and make them available in Johannesburg and it would be the duty of the defendant to pick up the containers in Johannesburg and take them to the warehouse in Pretoria, pack and ship the containers down to Durban into Stacks. From the Stacks the manganese is shipped to China. Thysse testified that the pricing for the FOB deal was at 450 per metric ton. But ultimately it was agreed at 408 per ton.

[16] It was Thysse's evidence that at a meeting held at the defendant's premises in December 2008, it was discussed and agreed that the defendant would receive the cargo, clear it, and take it to their warehouse to test it and pack it into containers and ship it to Durban. At this meeting Thysse conveyed that a minimum of 1 000 tons had to be built up and export could not take place immediately and it had to be stored until it was sufficient because there were truck loads of 30 tons coming down from Zambia and would store them until they were sufficient.

[17] Thysse further testified that he queried an invoice from the defendant to the amount of R150 per metric ton because their quote was R85 a ton and the response of the defendant was invoking R150 per ton was a precaution to hold the cargo not be transported and it would be deducted from the free on board charges once the cargo was exported

[18] As regards invoices raised by the defendant for which immediate payments were demanded, Thysse explained in evidence that Brombacher suggested via an email that the services of the defendant would be suspended or put on hold, he testified that he advised him that because there was a letter of credit there was no danger of not getting paid and in addition reminded them that as this was a free on board deal, all payment would be made at the end of the deal as per agreement. In essence his evidence was to the effect that he informed the defendant that all their payments would be made pursuant to a letter of credit as this was a free on board deal.

[19] Regarding the proposition put to him that the letter of credit was now out of time, Mr Thysse's evidence was that it was not necessary to issue a new one because the letter of credit could be amended without difficulty to increase the amount. It was Thysse's evidence that the letter of credit was an irrevocable letter of credit in the defendant's favour. He further testified that the letter of credit could be amended easily by mutual agreement within hours to cater for any unforeseen exigencies. The letter of credit was extended to 31 August 2009 and after that to 10 September 2009.

[20] In regard to the containers it was put to Thysse that the Defendant was not liable for the 50 containers because it was never a term that the Defendant had to pay for them. Thysse testified that the Plaintiff was going to pay for the containers that had to come from Durban, which would be for the Plaintiff's account.

[21] It was put to Thysse that Gumansky would testify he never agreed the Defendant would source the containers. Thysse testified that:

"*All deals done on Free on board basis are that the contractor would obtain the containers, stuff them with their products and send them to port.*"

[22] Again it was put to Thysse that the Defendant would contend it was not the Defendant's obligation to get the containers to Johannesburg City Deep and the shipping line had the responsibility to sponsor the containers. Thysse agreed that the Plaintiff had to pick them up from City Deep but contended that the Defendant had to get the containers to City Deep. Thysse agreed that the Plaintiff did volunteer to get them to City Deep.

[23] It was put to Thysse that Gumansky was going to say it was always the obligation of the plaintiff to get the containers because the plaintiff was dealing with the sea freight. In response Thysse testified that the plaintiff took on that obligation although under normal business trading it would have been the responsibility of the defendant to do that.

[24] Thysse further testified that as at the 19 August 2009 all the 50 containers were not there and neither were they there on the 21st August 2009, as confirmed by an email from Van Staden to the effect that since the containers had not left Durban and that the defendant resultantly could not start packing containers and thus the booking date was unachievable. Thysse also confirmed the email by Van Staden (for the defendant) asking about the 50 containers and requesting that they be uplifted and placed in IFC by 17h00 on the 29 Augsut 2009 and if not possible, the shipment be rolled to the next vessel. He conceded that the plaintiff's agent Nevan was collecting the containers from the depot and that the containers did not arrive on time, with the result that Gumansky urged the plaintiff to move the bookings.

[25] It was Thysse evidence that the containers did arrive on the 24 August 2009 exactly one day before Stacks opened and contrary to the defendant's advice that it should be supplied or provided with the containers at least seven to ten (7 - 10) days before. Thysse conceded that although it was late if the defendant had started working, they could have managed to transport the containers into stacks in time. He further confirmed that he repeatedly requested the employees of the defendant to proceed loading the containers because Brian Brombacher was not taking his calls.

[26] As regards the defendant's concerns that it did not want to be liable for dead freight, his evidence was to the effect that the plaintiff had already agreed to absolve them and thus he did not understand the defendant's basis refusing to proceed with the deal.

[27] It was put to Thysse that Gumansky would testify had they followed Defendant's advice and provided the containers seven to ten working days before they could have made the Bahia Grande. He responded by saying that in a meeting with Brombacher on the 24 August 2009 there was an

agreement to roll over the booking. He referred to his email dated 25 August 2009 addressed to Brombacher where he stated the following:

"*Dear Brian,*

Please collect the containers and start packing, as discussed. We have arranged road transportation into Stacks. If containers are loaded by midday 27 August and loaded onto Stacks we would be responsible for the dead freight. We will also pay the difference between road and rail freight."

[28] In essence, Thysse's evidence is that if the defendant had complied with his request albeit late, they would have made it to stacks. He confirmed that in desperation, he contacted various employees of the defendant in an attempt to persuade them to load the containers and have them railed to stacks by 16h00 on Thursday 27 August 2009.

[29] During cross examination, Thysse made the following concessions:

29.1 That at the meeting of 20 July 2009 the plaintiff agreed that it would arrange the booking with the shipping lines (who supply the containers) and who normally make the containers available for collection in Johannesburg. That the plaintiff was sourcing the containers by dealing directly with the shipping line, that the plaintiff was railing the containers from Durban and that the Defendant only had to collect the containers from Johannesburg. That the cost of transporting the containers from Durban to Johannesburg was always to be for the plaintiff's account. That the plaintiff was arranging the necessary containers and would revert to the defendant as soon as the containers were at hand. Further that it was cheaper for the Plaintiff to deal directly with the shipping lines even if they had to rail the containers from Durban to Johannesburg.

29.2 Thysse further agreed that the plaintiff agreed to items three and four listed in the 20 July 2009 e-mail specifically relating to; (a) the fact that the Defendant required seven to ten working days prior to stacks opening in Durban to successfully export the cargo; and (b) the provision of the letter of credit(my emphasis). Again, that the

containers were to be released by the shipping lines either to the party who makes the booking or some other nominated person. That the plaintiff would provide the defendant with the booking release from the shipping lines. That the plaintiff was aware of the need to have containers available in Johannesburg for the defendant to collect seven to ten working days prior to stacks opening. That there were no containers available for collection in Johannesburg and this was why containers were railed from Durban by the plaintiff.

29.3 Thysse further conceded that it would have been impossible for the defendant to load containers that were not available at that time. Significantly admitted that nowhere in the 20 July 2009 e-mail was it recorded that the defendant was obliged to source the containers and agreed that all 50 containers did not arrive timeously in Johannesburg for the vessel "Bahia Grande", and that all 50 containers only arrived on 24 August 2009 which was one day before stacks opened in Durban for the "Bahia Grande". The reason being due to bad weather that delayed Transnet and this was not the defendant's fault. That the plaintiff's real complaints with the Defendant relate solely to what happened regarding the vessel "Bahia Grande" and not with the vessels "Yaintain", "Rio De Janiero", or "Liba Salvador".

29.4 That Nevan (who worked for ideal cargo solutions) was appointed by the plaintiff to transport the containers from Durban to Johannesburg and was the plaintiff's agent. That the 50 containers arrived at a TFR Terminal (Transnet) and not at a private depot as originally requested by the defendant or advised by the plaintiff. He confirmed that the plaintiff was advised on numerous occasions to "roll the booking" to a new vessel because the shipment on the "Bahia Grande" could not be met. He also conceded that at that stage the defendant was endeavouring to assist the plaintiff. As a result of these difficulties it was agreed on the 24 August 2009 to roll the booking. Despite this agreement, the plaintiff nevertheless requested the defendant to attempt to ship on the Bahia Grande.

29.5 The most damning concession came when he conceded that had the plaintiff complied and followed the advice of the defendant none of the problems faced by the plaintiff would have happened.

29.6 Lastly Thysse conceded in evidence that the plaintiff undertook to bear the costs of transporting the containers from Durban to Johannesburg. When pressed further in evidence why it was contended by the plaintiff that the defendant must bear those costs, he responded by saying the plaintiff simply undertook that obligation to help the defendant as the plaintiff could not sit back while they miss the ship. He went on further and unequivocally stated that the plaintiff took on that obligation and obtained the containers and shipped them to City Deep.

[30] The next witness for the plaintiff was Mr Gambier, who described himself as the Executive President of Gold Mining Metals (Pty) Ltd, company based in Oman. His evidence was on the crisp issue of letters of credit because the defendant had alleged that the letter of credit was defective because it did not reflect the correct beneficiary and also that the latest shipment date or presentation date was never amended. He testified that letters of credit could be amended various times and that it could also be amended within a period of a day. His evidence was not seriously disputed or challenged by the defendant.

Evidence for the defendant

[31] Mr Gumansky ("Gumansky") the witness for the defendant confirmed all the concessions made by Thysse as correctly reflecting the terms of the agreement made on the 20 July 2009. He further gave evidence that throughout the discussions it was never discussed nor agreed that the obligations to source the containers would be the responsibility of the defendant. He stated that the costs benefit to the plaintiff in arranging the containers from Durban was going to be cheaper than arranging containers to be released in Johannesburg.

[32] He was emphatic in his evidence that as the defendant was not dealing with the shipping line, the obligations to source the containers from the shipping

line rested with the plaintiff. The defendant's obligation would arise once all the 50 containers had arrived at a private depot in Johannesburg for collection. It was Gumansky's evidence further:

32.1 That the defendant could not properly fulfil its obligations to ship on the "Bahia Grande" because of the plaintiff's failure to heed the terms of the 20 July 2009 agreement and the defendant's subsequent advice given on numerous occasions which were documented in various emails exchanged between Thysse and Brian Brombacher of the defendant. In these emails the plaintiff was implored to roll over the booking because of non compliance with the time limit set in the July 2009 agreement.

32.2 That the plaintiff agreed to "roll the booking" on the evening of 24 August 2009 but then amazingly the next day insisted on the defendant shipping containers on the "Bahia Grande". Again the defendant informed plaintiff that it was improbable to meet the deadline. However Thysse insisted that they should proceed with loading the containers. Gumansky testified that the defendant was not prepared to take risks and be liable for dead freight. He reiterated to Thysse that the booking be rolled over. According to him it would have been easy for the plaintiff to obtain a new booking for a new vessel and this could have been done in as little as three hours.

32.3 It was Gumansky's evidence that where the defendant makes the booking, the defendant has the responsibility to make sure that the containers arrive at depot in Johannesburg and the defendant will collect the containers from Johannesburg and bears the costs. He testified that in the present matter, the plaintiff sourced the containers from Durban and had to transport them from Durban to City Deep and bear the costs thereof.

[33] Gumansky further testified that as a result of the plaintiff's persistent demands to load the containers and the threat of dead freight in the email dated 25 August 2009, the defendant instructed its attorney Scarrott to write a letter to the plaintiff explaining the defendant's position with regard to what he

described as the plaintiff's failure to perform in terms of the agreement. He confirmed that Scarrott addressed a letter to the plaintiff detailing the defendant's position and the plaintiff's breach of contract. He denied that the defendant was in breach of the agreement and reiterated his evidence regarding the plaintiff's non performance.

[34] In essence Scarrot's letter repeated the evidence of Gumansky and rehashed the terms of the agreement between the parties and specifically reminded the plaintiff that it has failed to adhere to the terms of the agreement because the plaintiff did not release the containers in time and failed to stick to time, 7 to 10 days, agreed upon on the 20 July 2009.

[35] Gumansky's evidence that it could have been easier for the plaintiff to secure a new booking and provide the defendant with new booking information was not challenged despite the fact that according to Gumansky a new booking could be secured within three (3) hours.

[36] Counsel for the plaintiff criticised the defendant for not calling Brombacher despite being available and urged me to draw an adverse inference against the defendant for failure to give an explanation why he was not called. He submitted that since Brombacher was central to the negotiations he should have been called to shed more light on the background circumstances leading to the agreement and the subsequent conduct of parties which were extensively documented in the emails. He urged upon me to disregard the evidence of Gumansky and suggested that Thysse evidence on the roll over must be accepted as credible. The submission made is that as at the 25 August 2009, on the evidence of Thysse, there were 10 containers available and if the defendant had loaded them they could have made it to Durban and neither party would have been liable for dead freight. This argument is misplaced and ignores the agreement and the relentless demands by the defendant to roll over the booking because on the evidence of the defendant's witness, a clear a period of seven to ten days was required before stacks open and this period was clearly not adhered to. The suggestion that the defendant was obliged to perform within 2 days is fatally flawed. At that time when the defendant was expected to perform other containers were not available and Transnet depot could not be accessed because Transnet requires 24 hours before releasing the containers, thus the containers, could

not be released sometime before 25 August 2009, which would have made the deadline still unachievable.

[37] The criticism levelled against the evidence of Gumansky is without merit. Gumansky was an employee of the defendant and fully conversant with the terms of the agreement. His evidence on the emails demonstrated that he has intricate knowledge of the matter and was also central to the events leading up to the conclusion of the agreement and the plaintiff's failure to perform. During evidence, I did not get an impression that he was unable or had no knowledge of the matter. His evidence was succinct, coherent and explicit on the agreement. His knowledge or testimony on the emails was not seriously challenged or disputed by the plaintiff. It thus follows that his evidence insofar as the interpretation of emails are concerned is correct and unassailable. It was not suggested by the plaintiff that he was fabricating his evidence. I have no doubt accepting his evidence as reliable and satisfactory.

[38] There is no doubt in my mind that in order for the defendant to perform in terms of the agreement to roll over cooperation including performance of the plaintiff was essential.

[39] The contention of the defendant is that plaintiff knew the defendant's advice of what was needed to transport the manganese as from July 2009. It was repeatedly warned or advised to comply with its obligation and it failed to perform. At no stage did I understand the evidence of Thysse that the agreement was ambiguous or did not reflect the common intention of the parties. Plaintiff knew as far back as July 2009 what it had to do to comply with the agreement and failed to do so. The issue is whether there is any fault that could be attributed to the defendant. Thysse in evidence conceded that the delay is getting the containers from Durban to Johannesburg was a result of bad weather.

[40] Quite clearly, as at the 25 August 2009, the plaintiff failed or delayed to perform its part of the agreement to allow the defendant to perform. Thysse conceded that the defendant at the time (25 August 2009) could not start and move the containers because they were not there. This concession in my view sinks the plaintiff's case further into a quagmire.

[41] What the plaintiff sought to do was not in accordance with the agreement hence Mr Gumansky was not prepared to take risks lest he be mulcted with dead freight. The undertaking by the plaintiff to absolve them of any dead freight is not sufficient. I cannot fault Gumansky or the defendant for refusing to take the risk. The plaintiff was forewarned yet refused to heed the advice. The uncontested evidence of Gumansky is that if the shipping line cannot recover for the plaintiff it will look to the defendant for payment.

[42] In my view as at 24 August 2009 the plaintiff was in *mora creditoris* and thus not entitled to use the delay or non-performance on its part as a foundation for cancellation of the agreement against the debtor. It committed a material breach of the agreement when it failed to furnish or give the next booking date and most importantly to heed the defendant's advice. There were no containers or time i.e. seven to ten days. See ***Group Five Building Ltd v Minister of Community Development 1993 (3) SA 629 A at 651*** where Nienaber JA said the following:

"*So, for example, it has been held that a building owner cannot enforce a penalty clause if the delay complained of was caused by his or his agent's default*"

[43] Scarrott's letter is not a repudiation but a justified cancellation of the agreement based on the non-performance by the plaintiff. This letter must be viewed in its context because it was written after the plaintiff's persisted that the defendant should load the containers. This letter did not evince a deliberate and unequivocal intention no longer to be bound by the agreement but rather an attempt to extend an olive branch to the plaintiff to purge its default. It cannot be contended that this letter was a clear cut repudiation. See: ***OK Bazzars (1929) Ltd v Grosvenor Buildings (Pty) Ltd And Another 1993 (3) SA 471 (A)***. Repudiation must not be light presumed. It must account for all the proven facts. There is no shred of evidence that the defendant repudiated the agreement. It would seem to me that the plaintiff misconstrued its position.

[44] It was Gumansky's evidence that had the plaintiff obtained a new booking, the defendant would have been in possession of the containers and thus possible

to perform in terms of the agreement. His evidence that the defendant was still willing to perform in terms of the agreement provided the plaintiff rolled the booking to the next available vessel within an achievable time (7 to 10 days) remain unchallenged.

[45] The submission of the plaintiff's counsel that the defendant failed to perform in terms of the agreement is without substance. The evidence reveals that the plaintiff never provided the details of the next shipping vessel. Thysse conceded this point in his evidence and stated that the information could not be provided because they never had a booking available at the time. In my view it follows logically that without any booking, the defendant could not be expected to perform even if it was so inclined.

[46] On the version of Mr Thysse, the plaintiff did not provide the defendant with the 50 containers. The evidence of the plaintiff that it procured the containers from Transnet terminal is also not helpful. Transnet requires 24 hours notice before releasing the containers, thus clearly on the plaintiff's evidence it could not release them before the 25 August 2009. This in my view again made the deadline unachievable. All what the plaintiff had to do in the circumstances was to roll over the bookings to the next vessel. The defendant would have been able to perform and the dispute could have been averted. I agree with the defendant that failure by the plaintiff to roll over the booking made the deadline unachievable and this conduct constitute a breach amounting to *mora creditoris*.

[47] On the undisputed evidence of Gumansky a period of at least 3 hours was required to arrange a date and time for the next booking. The plaintiff failed to take this opportunity. The failure by the plaintiff to roll over the bookings thus making the deadline unachievable constituted a material breach of the agreement. In my view, the defendant faced with this untenable position, was fully justified in approaching its attorneys to set the record straight. I do not agree with the plaintiff's proposition that the defendant through its attorney repudiated the agreement. On the contrary, the evidence quiet clearly indicate that the plaintiff failed to perform in terms of the agreement and refused or neglected to heed the advice of the defendant to provide the containers and adhere to seven to ten days period.

[48] I am in agreement with the defendant that the material breach of the agreement was caused by the plaintiff's failure to perform its part of the contractual obligation. The evidence of Gumansky that the defendant was willing and prepared to continue with its performance if the booking date was rolled over supports counsel's submission that the conduct of the plaintiff in failing to perform an act which is necessary to enable the defendant to perform essentially amount to *mora creditoris*. See: ***Martin Harris & Seuns OVS (Edms)Bpk v Qwa-Qwa Regeringsdiens 2000 (3) SA 339 (SCA) 349.***

[49] As regards the claim for the costs of the containers, Mr Thysse conceded that in the original particulars of claim and the subsequent amendment dated November 2009 it was the responsibility of plaintiff to carry those costs. When it was brought to his attention that in the second amendment dated 7 October 2011, the obligation has now shifted to the defendant, he could not furnish any plausible explanation save stating that this was not a really important term of the agreement.

[50] In the light of the concession and apparent contradiction, the evidence of Thysse on this aspect cannot be accepted as reliable. Quiet clearly this would appear to me to be an afterthought. I say this because Thysse during evidence and cross examination admitted to consulting with his attorney fully and vetted the particulars of claim. He must have known at that time, on whose shoulders rest the obligation to pay for the containers. The evidence or suggestion that defendant would now have to carry the costs is unreliable and I reject it. I accept that there was never any tacit or implied agreement that the defendant would pay for the containers.

[51] In the circumstances I am satisfied that the plaintiff has failed to discharge the onus that it is entitled to the relief sought.

I therefore make the following order:

1. The plaintiff's claim is dismissed with costs.

R. MATHOPO J

Judge of the South Gauteng

High Court, Johannesburg

Appearance:

For the Plaintiff	:	Adv. S. Cohen
Instructed by	:	Louise Weinstein Attorneys
For Defendant	:	Adv. E. Fasser
Instructed by	:	Robert H Kanarek Attorneys
Date of hearing	:	09, 12, 13, and 14 November 2012 02, 03, and 04 September 2013
Date of Judgment	:	22 October 2013