IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE DIVISION, CAPE TOWN

REPORTABLE

CASE NO: A105/2021

In the matter between:

TRADEVEST 041 (PTY) LTD
T/A TRADEVEST LOGISTICS Appellant

and

BANZI TRADE 40 CC Respondent

Bench: P.A.L.Gamble, J & T.Le Roux, AJ.

Heard: 6 August 2021

Delivered: 2 September 2021

This judgment was handed down electronically by circulation to the parties' representatives via email and release to SAFLII. The date and time for hand-down is deemed to be 10h00 on Thursday 2 September 2021.

JUDGMENT

GAMBLE, J:

INTRODUCTION

1. This appeal from the Regional Court, in which the appellant was ordered to pay the respondent the sum of R354 460,20 together with interest and costs, concerns the transportation of a load of sugar measuring 34 tons from Durban to Queenstown. The facts, which are somewhat intricate but largely not controversial, gives some insight into how the local freight industry generally operates: it appears from the evidence that it is not uncommon in that industry for a contracting party to subcontract (and thereby abrogate its rights and responsibilities) to another party in the industry and even for the latter mentioned party to subcontract its obligations further. This appeal concerns a relationship of subcontracting between the appellant ("Tradevest") and the respondent ("Banzi")

THE FACTUAL MATRIX

2. During May 2017 a Johannesburg-based company, Traxys Africa Trading (Pty) Ltd ("Traxys"), traded commodities such as sugar. In the course of its business, it procured 34 tons of sugar from a cargo which had been transported to Durban by ship from the Al Khaleej sugar refinery in the United Arab Emirates and which was housed in storage at a warehouse in the Port of Durban operated by Maydon Wharf Port Terminals (Pty) Ltd ("MFT").

3. MFT was required to pack the sugar into one-ton bags as part of its arrangement with Traxys. Traxys thereafter sold the 34 tons of sugar to a national soft drink manufacturer called Twizza (Pty) Ltd and was required to deliver it to Twizza's

plant at Queenstown in the Eastern Cape. Traxys would then invoice Twizza (which has its head office in Cape Town) for the load of sugar so delivered to it and Twizza would settle Traxys directly.

4. MFT attended to the transport arrangement for delivery of the load of sugar on behalf of Traxys and to this end, it contacted an existing client, Banzi, which runs a road transport brokerage business at Hoedspruit in Limpopo. With Mr. Kishore Rampersada representing MFT and Mr. Albrecht Heroldt representing Banzi, it was agreed that Banzi would arrange for the collection of the load in Durban and the delivery thereof to Twizza in Queenstown.

5. Mr. Albrecht, who was the sole member of the close corporation, testified on behalf of Banzi in the court *a quo,* that his company sub-contracted delivery of the load to Tradevest, which had its offices in Somerset West. He knew the erstwhile owner of Tradevest, Ms. Lize van der Berg, as she had previously operated a freight transport company at Mbombela in Mpumalanga and, on the strength of their previous working relationship, he was amenable to doing business with Tradevest. Mr. Albrecht harboured no reservation about sub-contracting the delivery to another freight company. As will appear hereunder, this arrangement was contemplated in Banzi's on-going agreement with MFT and, in any event, seems to be standard practice in the industry.

6. Ms. Van der Berg explained to the court *a quo* that Tradevest's business consisted of two components. On the one hand, it owned a fleet of ten long-distance trucks with which it transported cargo on behalf of its clients and on the other hand, it ran a transport broking business in which it sub-contracted the delivery of cargo on

behalf of clients to certain of its own approved sub-contractors. The broking arm of the business had grown out of a need to service clients in circumstances where Tradevest did not have sufficient capacity on its own fleet of trucks to transport cargo.

7. Mr. Eric Janse van Rensburg, who was employed in Tradevest's broking division, told the court *a quo* that a number of freight transporting businesses belonged to a WhatsApp group which served as an electronic platform on which members of the group would advertise cargo available for delivery. It was through this medium that Tradevest came to hear of the load of sugar which Banzi was required to deliver to Twizza.

THE LOAD CON

8. Tradevest accordingly contracted with Banzi to deliver the load to Queenstown in terms of an agreement that was partly oral and partly written. The written component of the agreement was contained in an industry standard document known as a "load confirmation", or a "load con" as the witnesses all called it. It was said to be standard practice in the industry that once parties had orally agreed a rate for the conveying of the load, as well as the date and place of collection and delivery, a load con would be issued to the company undertaking the transport of the load. In short, a load con is a written instruction from a party engaging the services of a transporter to collect and deliver a load on its behalf to a designated party - it would seem not unlike a bill of lading in shipping parlance.

9. In this case, Banzi issued a load con on its *pro forma* document to Tradevest which recorded, inter alia, that –

- The transporter of the load was to be Tradevest;
- The commodity to be transported was sugar;
- The date for collection of the load was 10 May 2017;
- The place of collection was MFT, Durban;
- The registration number of the truck collecting the load was FH 36 PT GP;
- The driver of that truck was to be one “Norman”; and
- The rate payable by Banzi to Tradevest for the delivery of the load was R14 000,00.

10. As far as the place of delivery was concerned, the Banzi load con records that “Off Loading” of the sugar was to be at “Queenstown as per POD”. The testimony revealed that the acronym “POD” refers to a document evidencing “Proof of Delivery” of the load. This is evidently an important document in the freight industry as it establishes delivery of the load to the consignee and the entitlement of the transporter to demand payment from the consignor for its services upon delivery thereof. To this end, the Banzi load con expressly requested the transporter to furnish it with “All signed POD’s with invoice please”. This suggests that the payment of freight to Tradevest was contingent upon production by it of a POD containing the signature of the party to whom the load has been delivered, in this case Twizza.

11. In addition to the aforegoing, the lower third of the Banzi load con (which is contained on an ordinary A4 page) contains twelve "TERMS AND CONDITIONS OF THE LOAD CONFIRMATION". The reader of that document's attention is drawn to the terms and conditions through an expressive annotation in bold print towards the top thereof which reads

"***NB!!!!!!!!: #1,7,8 & 11 of Terms and Conditions very important!!!!!!!!*** "

12. The particular terms and conditions to which the reader's attention is drawn are not material to this appeal. However, terms 2 and 4 are material and were referred to in evidence. They read -

"**2) The transporter and vehicles must have their own goods in transit insurance of R500 000.00 (inc Hi-Jack)**….

4) The transporter will be held liable for any loss damages (sic) to cargo."

It should be noted that, unlike term 2, term 4 is not recorded in bold print. However, the 12 terms and conditions are, as a whole, boldly reflected on the Banzi load con and the ordinary reader thereof could hardly not notice them.

13. During argument of the appeal, counsel for Banzi drew our attention further to term 11 (also printed in bold uppercase) –

"**11) IF ORIGINAL SIGNED/STAMPED DOCUMENTATION IS NOT RECEIVED NO PAYMENTS WILL BE MADE. R250.00 CHARGES IF POD'S IS** (sic) **LOST FOR RECOVERY**"

14. Turning to Tradevest's *pro forma* load con, one notes that the A4 size document contains similar detail to that on Banzi's – the date and place of collection of the load, the truck registration number and its driver, and the delivery address (also recorded as "Queenstown as per POD"). The document further records that Tradevest's sub-contractor was "Gienro Solutions" in Gauteng and that the rate for the transport of the load was R12 500.00.

15. The lower half of Tradevest's load con is reserved for its "Terms & Conditions" which are stipulated in 10 numbered paragraphs and enclosed in a designated box. These terms and conditions are reflected in a very small typeface and have the hallmark of having been prepared by someone with a modicum of legal training – the language is far more formal and legalistic than the plain, industry vernacular to be found in Banzi's load con. Other than a recordal of Tradevest's physical address in bold, the remainder of the document is in normal font and, viewed with the ordinary user's eye, the document appears to contain the sort of "fine print" which one so often encounters in documents relating to commercial transactions and which have found consideration over the decades in the so-called "ticket cases".

16. Once again, the only terms in Tradevest's load con which are of any relevance are the following which were referred to in evidence.

"2. The loading of the load is proof of the unconditional acceptance of terms and conditions contained in this document…

4. The risk in and to the load shall pass to the subcontractor once the load is loaded onto the vehicle to be used for the transportation thereof at the collection address and shall remain

with the subcontractor until the load is off-loaded at the delivery address. Furthermore, **the subcontractor shall be liable for any loss or damage to the property**, injury to or death of persons or any costs or expenses of whatsoever nature which is caused by the acts or omissions of the subcontractor or any person or party for whose acts or omission the subcontractor is vicariously liable in the performance of the transportation services AND agrees to indemnify TRADEVEST LOGISTICS from and against any legal proceedings, claims, demands, costs, or liabilities in this regard.

5. The subcontractor shall maintain and keep in force throughout the duration of the loading, transportation and off-loading of the load the following insurance policies:-

5.1 All Risks Good (sic) in Transit insurance including hijacking cover with a cargo value as per the “LOAD VALUE” listed above;

5.2 Public liability insurance with a minimum indemnity limit of R5’000 000 (sic) per incident; and

5.3 Comprehensive vehicle insurance in respect of each vehicle to be used for the transportation of the load.

If the insurance covers referred to above in this clause are not in place or are inadequate, the subcontractor shall indemnify TRADEVEST LOGISTICS (Pty) Ltd from and against any loss, damage or liability arising from such omission or inadequacy.” (Emphasis added)

ISSUES FOR DETERMINATION

17. Notwithstanding the generation of a couple of hundred pages of transcript, the issues in the court *a quo* were ultimately relatively limited. In its

particulars of claim, Banzi alleged that it concluded an agreement with Tradevest to collect the load of sugar at MFT and deliver it to Twizza in Queenstown. It further alleged that Tradevest collected the sugar and failed to deliver it to Twizza, thus breaching the material terms of the agreement. It claimed that the value of the load was R 354 460,20 (34 tons x R9145,00/ton plus VAT at 14%) and that it was liable to MFT in that amount as a consequence of the non-delivery of the sugar to Twizza. It thus sued Tradevest for contractual damages in the sum of R354 460,20.

18. Banzi alleged that the terms and conditions of its agreement with Tradevest were contained in its load con issued to Tradevest and it further alleged that it was an express, alternatively implied, alternatively tacit term of their agreement that Tradevest would exercise a duty of care in respect of the load of sugar entrusted to it for transportation.

19. After managing to fend off an application for summary judgment with an affidavit by Ms. van der Berg that was at variance with some of her subsequent oral evidence, Tradevest availed itself of some obtuse denials in its plea. For instance, it denied that the load was collected in Durban and further it denied that it owed Banzi a duty of care in respect of the load of sugar entrusted to it for transportation.

20. But, when all was said and done in the witness box, Tradevest's case was that the sugar had been collected from MFT by Gienro and had indeed been delivered to Twizza. It contended that it had thus complied with its contractual obligations vis-à-vis Banzi and was not in breach of their agreement. Tradevest did not prefer any counterclaim against Banzi for payment of the sum of R14 000,00 due under the Banzi load con, notwithstanding the alleged delivery of the sugar to Twizza.

21. Mr. Heroldt testified that Tradevest had never submitted a POD to Banzi in respect of the alleged delivery of the load to Twizza in Queenstown. In addition, Mr. Kurt Potgieter, Twizza's national goods procurement coordinator employed at its head office in Cape Town, testified on behalf of Banzi. He said that Twizza was not placed in possession of a POD in respect of the load of sugar either (as was required in order to confirm delivery thereof to its Queenstown premises) and accordingly Twizza denied delivery of the load to it. Banzi relied heavily on this evidence to establish that Tradevest was in breach of its contractual obligation under the Banzi load con.

22. Tradevest was unable to produce a POD (whether signed or otherwise) reflecting delivery of the load of sugar to Twizza by Gienro. The explanation put up in the court *a quo* by Ms. van der Berg and Mr. Janse van Rensburg (all based on hearsay evidence of varying degrees) was that after delivery of the load to Twizza, Gienro had claimed to have sent the POD to Tradevest by post but that this had gone missing in the mail. Tradevest was unable to procure a copy of the POD from Gienro and when it contacted Twizza many, many months after the alleged delivery in an attempt to obtain a copy from Twizza, it was told by an unidentified male employee at Twizza that no such POD could be found because of the "chaotic" state of affairs at Twizza. The state of "chaos" was never fully explained but it seems as if it was a reference to Twizza's administrative department.

23. Banzi adduced the evidence of Messers Herholdt and Rampersada to establish the arrangement regarding collection of the sugar from MFT, this because such collection was denied on the pleadings. As I have said, it later became common cause when Ms. Van der Berg testified that Gienro had duly collected the load in

accordance with the load con issued to Tradevest by Banzi. The collection was said to have been in terms of Tradevest's sub-contracted load con with Gienro.

24. The issues then that remained for adjudication by the court *a quo* were as follows.

- Whether Tradevest had a duty of care towards Banzi for the goods entrusted to it for delivery to Twizza;
- Whether the load of sugar had in fact been delivered to Twizza;
- The extent of Banzi's contractual damages (if any) as a consequence of the alleged breach by Tradevest of its obligations under the Banzi load con.

The latter issue, in turn, encompassed consideration of the following factors:-

- Whether Banzi was contractually liable to MFT in damages for the value of the load that allegedly went missing; and,
- If so, what the value of that load was;

<u>DID TRADEVEST OWE BANZI A DUTY OF CARE IN RESPECT OF THE LOAD?</u>

25. Much time was spent in the Court *a quo* by Ms. Manser (who appeared for Tradevest in that court and on appeal before us) in cross-examining Mr. Heroldt about the enforceability of the terms and conditions of the Banzi load con. The suggestion was that because he and Ms. van der Berg had not expressly agreed

thereon, the terms were not enforceable. The point is without merit for a variety of reasons,

26. Firstly, there is the issue whether the terms and conditions contained in the Banzi load con came to the attention of Ms. van der Berg (or any other authorized agent of Tradevest) and, if not, whether Banzi is nevertheless entitled to rely thereon. The evidence of Ms. van der Berg confirmed that she was aware of the fact that it was commonplace in the transport business for public carriers to attach terms and conditions of their preference to their load cons. Indeed, Tradevest did precisely that when it issued the *pro forma* document, which was used to sub-contract conveyance of the load of sugar to Gienro. It is apparent that its terms differ in both content and extent from those chosen by Banzi.

27. So, for instance, Ms. van der Berg pointed out that the aforesaid clause 2 of Tradevest's terms and conditions was the company's mechanism for ensuring that the counter-party was bound by its terms and conditions. But Ms. van der Berg also said that she was aware that, while each contractor stipulated its own terms and conditions, it was impractical from a business point of view to review each counter-party's set of terms before accepting a load con from a contractor.

28. The witness put it as follows when asked by Ms. Manser if she followed up with each contractor to whom a Tradevest load con had been issued to establish whether her company's terms and conditions had been accepted :-

"There is (sic) so many loads going on in a day and there is (sic) so many agreements going on, on which loads to load that there is absolutely no time to call each and every contractor

and ask if they read my terms and conditions and for that reason I put that clause in, clause 2 of page 3."

29. Ms. van der Berg said that she did not normally read through the terms and conditions of a load con issued by another public carrier to Tradevest, while confirming that it was "standard" to include such terms and conditions in load cons generally. The following passage concluded her evidence on this point:-

"MRS MANSER: Mr. Herholdt testified that because you are a seasoned transporter and that you have been in the industry for so long, you must have been aware of these terms and conditions.

MRS VAN DER BERG: I am aware of terms and conditions but each load is a different contract."

30. The evidence thus establishes that the dealings between Banzi and Tradevest were conducted on the basis

- of an oral agreement followed by a load con that was issued to Tradevest;

- that the load con contained terms and conditions stipulated by Banzi and which were standard to the industry; and

- that Tradevest was aware that there were such terms and conditions and that its guiding mind (or for that matter any other employee) did not bother (or consider it necessary) to read them.

This places Tradevest in the position considered by Christie[1] at p 211 *et seq* and in particular the leading case in point, King's Car Hire[2].

31. Christie distinguishes the position in cases where the "fine print" relied on by the offeror in a contract is contained, on the one hand, in a written document signed by the parties and, on the other hand, where the document is unsigned – what the author broadly terms the so-called "ticket cases". The Banzi load con falls into the latter category, there being no signature appended to the document by either party. The commercial rationale for binding a party such as Tradevest to Banzi's stipulated terms and conditions is discussed as follows by Christie at 211.

"Banking, consumer finance, insurance, the transport of goods, electricity and water supply are examples of services that can be supplied on a large scale only if the supplier can be reasonably certain that the carefully drafted contracts in which it defines its own and the customer's obligations will produce, if tested in court, the result on which its planning and policy is based… Public entertainment, sports promotion and passenger transport are examples of enterprises that attract so many customers to the same place at the same time that the delay involved in obtaining a signature from each one of them could only be eliminated by a proliferation of entry points and staff, for all of which the customers would have to pay. To make obtaining of a signature unnecessary the law has therefore evolved a set of rules in what are usually known as the 'ticket cases'.

This description, for lack of a better one, may be used, to cover all cases in which the supplier places before the customer a document that is not intended to be signed and that contains or refers to the terms on which the supplier is prepared to do business, whether or not the

---

[1] GB Bradford, Christie's Law of Contract in South Africa, 7th ed.

[2] Kings Car Hire (Pty) Ltd v Wakeling 1970 (4) SA 640 (N)

document is what is normally described as a ticket, because the basic principles are the same in all such cases…

If it cannot be proved that the customer read the document, the customer will nevertheless be bound by it if the supplier did what is reasonably sufficient or reasonably necessary, or everything reasonably possible, to draw the customer's attention to the terms contained are referred to in the document."

32. The evidence put up by Tradevest thus establishes that it knew that Banzi's load con contained terms and conditions relating to the transport of this particular load of sugar and that such terms were standard terms in the industry. In addition, the Banzi load con contains a reference to the terms in bold print that is unmissable to the reasonable reader. That places Tradevest in the position described as follows by the Full Court in King's Car Hire[3].

"Stating the matter briefly, the approach of the Courts is to inquire whether the person who received a ticket knew that there was printing or writing on it. Secondly, if so, a further question is 'did the person who received the ticket know that the printing or writing contained provisions of, or references relating to provisions of, the contract in question?'. If these questions are answered in the affirmative, then the provisions in question are part of the contract."

33. In the circumstances, this Court is satisfied that clause 4 of the terms and conditions stipulated in the Banzi load con was incorporated in the contract between it and Tradevest.

---

[3] At 643D-F

34. The importation of that term into the contract between Banzi and Tradevest is in any event in accordance with the common law principles governing the law of carriage of goods by a public carrier which are to the effect that the carrier, as the depositary, is liable for the loss or damage to goods entrusted into its care for the purposes of delivery to the nominated consignee.[4]

35. In Stocks & Stocks[5] Corbett JA discussed the obligations of a public carrier by land (as Tradevest manifestly was) against the background of an argument that such a carrier attracted strict liability in terms of the so-called "Praetor's Edict"[6] to public carriage by land (as opposed to by sea). The applicability of the Edict to carriage by land was the subject of on-going judicial debate, a debate which was only finally settled in1995 in Anderson Shipping[7] when Joubert JA held that a public carrier by land did not attract strict liability.

36. The position was articulated thus by Corbett JA in 1979 who proceeded on the assumption that the Praetor's Edict did not apply to such carriage.

"Assuming, however, that the Edict does not apply to public carriers by land, it seems to me that the carrier would still be in the position of a depositary or bailee for reward, who is under a duty to exercise reasonable care in regard to the goods entrusted to him for conveyance and who, in the event of the goods being damaged or destroyed, is liable in damages to the

---

[4] LAWSA (2nd ed.) Vol 2 Part 1 para 603 at p326.

[5] Stocks & Stocks (Pty) Ltd v TJ Daly & Sons (Pty) Ltd 1979 (3) SA 754 (A) at 761H – 762C

[6] This was a principle of Roman Dutch law which imposed strict liability upon "seamen, inn-keepers or stable-keepers (*nautae,caupones,stabulari*)" in respect of goods entrusted to them for safe-keeping.

[7] Anderson Shipping (Pty) Ltd v Polysius (Pty) Ltd 1995 (3) SA 42 (A)

owner thereof unless he can show that the damage or destruction occurred without *culpa* or *dolus* on his part."

37. Lastly, it did not avail Tradevest to take issue with its obligation to take care of the load of sugar consigned to it for transport for the reason that it sought to impose precisely such an obligation on Gienro under clause 4 of its load con; the point being that, in accordance with the *nemo plus juris* rule[8] Tradevest could not purport to impose such an obligation on Gienro if it did not possess the obligation in the first place through its prior dealings with Banzi.[9]

PROOF OF DELIVERY OF THE LOAD TO TWIZZA

38. In para 3 of the particulars of claim Banzi pleaded its obligation under its agreement with MFT to transport the sugar from Durban to Queenstown, while in para 4.1 thereof it alleged that on 10 May 2017 it "brokered/subcontracted the transportation of the goods" to Tradevest. Tradevest pleaded that it had no knowledge of the allegations contained in para 3 of the particulars of claim and put Banzi to the proof thereof. It admitted para 4.1.

39. The breach of the agreement with Tradevest was pleaded as follows by Banzi.

---

[8] *Nemo plus juris ad alium transferre potest quam ipse habet* – "No one can transfer to another a greater right than he has himself" (Claasen Dictionary of Legal Words and Phrases Vol 3 [Issue 1] N-26)

[9] ISEP Structural Engineering and Plating (Pty) Ltd v Inland Exploration Co (Pty) Ltd 1981 (4) SA 1 (A) at 9F

"6. In breach of the terms of the agreement between the parties, the Defendant and/or its employees and or [its] further (*unauthorized*) sub-contractor collected the goods at the collection point at MFT, Durban, but failed to deliver same at its destination point in Queenstown."

40. Tradevest's answer to para 6 of the particulars of claim was pleaded as follows.

"**AD PARA 6**

12. The defendant denies each and every allegation contained in this paragraph and places the Plaintiff to the proof thereof."

41. As already stated, it became common cause during the trial that the load had been collected from MFT, with Tradevest alleging that the collection by its sub-contractor Hienro was lawful. The allegation by Banzi that the sub-contracting of the delivery of the load to Hienro was "unlawful" is not material to this appeal. On the pleadings as they stood, therefore, Banzi bore the onus of proving that Tradevest had breached the contract evidenced by the Banzi load con by failing to deliver the load to Twizza in Queenstown.

42. In Alex Carriers[10] Mpati J dealt with the issue of the onus in the post-Anderson Shipping context as follows.

---

[10] Alex Carriers (Pty) Ltd v Kempston Investments (Pty) Ltd and another 1998 (1) SA 662 (ECD) at 674D

"But before the carrier can be saddled with the *onus* of showing that the damage to or destruction of the goods occurred without *dolus* or *culpa* on his part, the plaintiff must, in my view, have laid the foundation therefore by proving that the goods had in fact been damaged, i.e. that the value thereof upon delivery at the delivery point was non-existent or less than it was at the time when they were received by carrier."

Applied to the present case, this required Banzi to lay an evidential foundation to prove that the load of sugar had not been delivered to Twizza

43. While the production of a POD by Tradevest for the delivery in question would have entitled it to present Banzi with an invoice and demand payment in terms of its load con[11], it does not follow that the absence of a POD necessarily established that delivery had not taken place as required under the load con. For instance, it is possible that Hienro may have omitted to procure Twizza's employee's signature on the document, or that it failed to deliver the POD to Tradevest, that the document had gone missing in the post or even that the proverbial dog had eaten it. In the circumstances, it was incumbent on Banzi to adduce sufficient evidence in the Court *a quo* to prove non-delivery of the sugar to Twizza on a balance of probabilities. This it attempted to do through the evidence of Messers Albrecht and Potgieter.

44. Mr. Albrecht adduced reams of hearsay evidence in that regard which I shall recite for what it's worth. He said he had contacted a certain "Norman" (the alleged driver of the truck on which the sugar had been loaded by MFT) by cellphone on 3 occasions. The first call was evidently at 17h40 on 10 May 2017, when Mr. Albrecht said Norman confirmed to him that he had loaded the sugar and had left the

---

[11] "ALL SIGNED POD'S WITH INVOICE PLEASE"

premises of MFT. A further call to Norman at 08h50 the following morning, said Mr. Albrecht, went unanswered. At 16h50 that day, 11 May 2017, Mr. Albrecht said that he spoke to Norman again (after yet another unanswered call shortly before that) and established that the truck was then at Ngcobo in the Eastern Cape. After making some calculations, Mr. Albrecht worked out that the truck was then some 142 km from Queenstown and he testified that he expected it to be at its destination around 19h30 that evening.

45. Mr. Albrecht testified that he made another call to Norman on 11 May 2017 (he did not specify the time) but was unable to contact him. So too on 12 May 2017. Eventually, said Mr. Albrecht, he reported the situation to Tradevest's controller, Mr. Janse van Rensburg, but he did not tell the court *a quo* what the outcome of that discussion was. However, what Mr. Albrecht did not do at that time was to call Twizza in Queenstown and ask whether the load had in fact been delivered. On this score, the evidence of Mr. Potgieter established that at that time Twizza was taking delivery of three to four such 34 ton loads of sugar a week. He stated that 34 tons of sugar is a sizeable load and that its non-delivery would certainly have been noticed at the time during a physical inspection at the Twizza warehouse. I understood him to suggest that there would have been a vacant space in the warehouse suggesting non-delivery.

THE MISKEY LETTER

46. The further evidence adduced by Mr. Albrecht was that on 3 September 2018 a firm known as "Miskey Legal Consultants" acting on his instructions had sent a letter of demand to Tradevest claiming payment of the sum of R357 000.00 (excluding VAT), being the estimated value of a load of sugar "brokered" by Banzi to Tradevest

for delivery “to its intended destination”. The letter of demand does not make reference to the date or place of delivery nor the mass of the load. There is no reference either to any number of a waybill or the like.

47. The Miskey letter is revealing to the extent that it claims, “our client, on the 30th August 2018 discovered that the sugar load in question was never received by its client, and immediately advised you hereof on the very same day.” In other words, it was alleged that Mr. Albrecht only came to hear of the alleged non-delivery of the sugar some 15 months after it was destined for delivery, presumably to Twizza. But, there is more.

THE STAFFORD LAW LETTER

48. In attempting to establish the extent of Banzi’s damages for the alleged non-delivery by Tradevest, Mr. Albrecht referred to a letter written to Banzi on 6 June 2019 by a firm of Sandton attorneys, Stafford Law, on behalf of their client, MFT. That letter sets out MFT’s allegations regarding an agreement it concluded with Banzi on 7 April 2017, the salient terms whereof were said to be that –

- Banzi would provide logistical support to MFT for individual orders placed with it by MFT, with each such order constituting a separate contract;

- Banzi was entitled to subcontract any particular order placed with it to its subcontractor;

- Banzi would accept the risk for goods so transported and warehoused at the cost price thereof;

- MFT would pay Banzi within 30 days of its monthly statements; and

- All claims for losses incurred by MFT in the discharge of Banzi's services would be settled by Banzi within 60 days of receipt of by it of MFT's tax invoice for such loss.

As I read the record, Mr. Albrecht does not appear to have taken issue with the terms of this agreement with MFT. Rather, Banzi sought to rely on the letter and its contents for purposes of quantifying its contractual damages, of which more later.

49. The Stafford Law letter goes on to allege that during May 2017 MFT sent an order to Banzi for the transport of 34 tons of sugar from Durban to Queenstown. It is said that in January 2018, Banzi asked MFT "if there were any queries with the aforementioned load". Upon being advised by MFT that "no issues had been raised at the time", Banzi invoiced MFT for payment of its services in the amount of R15 000,00 under invoice no.120369.

50. It is further alleged that in August 2018, MFT notified Banzi that the load had in fact not been delivered, notwithstanding Banzi's invoice to MFT as aforesaid. Thereafter, it is claimed, MFT received an invoice from its client (which is not identified but is presumed to have been Traxys) for the loss which it had incurred as a consequence of the disappearance of the load. In the result, said Stafford Law, MFT invoiced Banzi on 11 October 2018 for the alleged cost price of the goods, to wit

R357 569,50[12]. Given that Banzi had failed to settle MFT's invoice within 60 days, a formal demand for payment was made on behalf of MFT with the customary threats of ensuing litigation in the event of non-payment.

51. The Stafford Law letter is notable for two reasons. Firstly, it suggests that from April 2017, there was an on-going commercial relationship between MFT and Banzi for the transport of cargo. Secondly, it confirms the allegations made in the Miskey letter that Banzi (through Mr. Albrecht) only came to hear of the non-delivery of the load towards the end of August 2018. I shall revert to this later.

TWIZZA'S EXPLANATION

52. Given the absence of any direct knowledge of non-delivery on the part of Banzi as a consequence of the sub-contracting of the work to Tradevest and the further sub-contracting by it to Hienro, the only feasible way for it to establish non-delivery of the load was to adduce evidence from Twizza. Accordingly, Banzi called Mr. Potgieter to testify.

53. Mr. Potgieter said that since 2016 he had been employed at Twizza's Head Office in Cape Town and was the company's "group supply chain coordinator". It was thus fair to assume that he would know what product Twizza had ordered, from whom it was ordered and when and where delivery of goods so procured had occurred. Yet Mr. Potgieter's evidence was anything but clear. He had no personal

[12] It is common cause that on 1 April 2018, VAT increased from 14% to 15%, hence the higher amount then being claimed.

knowledge of the alleged lost load and could only rely on a series of documents, none of which were generated by him or his department.

54. Firstly, Mr. Potgieter was shown a credit note in the sum of R365 119,20 issued by Traxys in favour of Twizza on 31 October 2018. He testified that he would have received this document in course of his duties and he stated that this amount was credited to Twizza “for a load of sugar that was not delivered to our Queenstown branch.” In an endeavour to link this document to the missing load, Mr. Potgieter was referred to various reference numbers on the credit note. It was pointed out that on this document -

- the “Contract No.” was “JA 11980”;
- the “Credit No.” was “TATC-599”;
- the “Harbour Permit No.” was “4212”
- there was reference to a serial number (the classification whereof was not described) which read “UME WSIC45 03312017”
- the description of the goods was “ICUMSA 45 White Refined Sugar (AL KHALEEJ)” contained in 34 x 1 ton bags.
- the price per ton was “R9420.00” giving a “TOTAL VALUE” of “R365 119.20” made up of “R320 280.00” (i.e. 9420 x 34) plus “R44 839.00” (being VAT at 14%)

- there was an additional annotation that read “TAT-0184 and part of TAT-0193”

55. Then, Mr. Potgieter was shown a tax invoice which was issued by Traxys to MFT on 7 August 2018 about which the witness said he had no knowledge. Nevertheless, he was taken through the document in an attempt to show similarities with the credit note. On the tax invoice it appears that –

- the contract number was the same as that on the credit note (JA 11980);
- the invoice number was recorded as TAT-01846;
- the UME reference was the same as that on the credit note;
- the harbour number differed and was recorded as “4293”;
- the description of the goods was the same, save that the price per ton was reflected as “R9145.00” giving a total value of the tax invoice as “R354 460.20”, being “R310 930.00” (i.e. R9145 x 34) plus VAT at 14% of “R43 530.20”.

56. Despite his manifest lack of knowledge of the codes referred to by Traxys on its documents, Mr. Potgieter speculated that the reference on the credit note to “TAT-0184” was a cross-reference to the tax invoice, notwithstanding the obvious absence of an additional numeral. As regards the inscription “part of TAT-0193 refers”, Mr. Potgieter said

"And the other one I cannot confirm exactly what for but it is highly likely a pricing difference."

Lastly, as regards the manifest difference in harbour numbers, the witness said,

"I cannot explain that, because the harbour number has of (sic) no reference to Twizza itself."

57. Earlier, Mr. Rampersada was asked under cross-examination by Ms. Manser to explain the relevance of the "harbor permit exit number" on a document by that name generated by MFT. He confirmed that each such permit number referred to a separate and specific load leaving the port. The witness was then shown such a document which was said to relate to the load in question. This document (generated at 23:38:24 on 10 May 2017) contained, inter alia, the following information –

- The harbor permit exit number was 4293;
- A truck with registration number FH 36 PT GP was being driven by one "Lucky";
- The transporter was described as "TRADEV" (which was taken as a reference to Tradevest); and
- The load was 34 X 1 ton bags of white sugar.

58. Mr. Rampersada also identified a form completed in manuscript by one of the MFT clerks from which the information on the harbor permit document was sourced. That manuscript document recorded that the truck in question, driven by a certain "Lucky", departed the MFT premises at 17h40 on 10 May 2017.

59. In cross-examination Mr. Potgieter was referred to a typed document issued on Twizza's letterhead dated 15 January 2019, marked for the attention of "To Whom It May Concern" and signed by one Karin Aylwin, a "Production Cost Controller" with Twizza. It reads as follows.

"This is to confirm that sugar load of 34,000kg on harbour permit number: 4212 dated 22.05.17 arranged by Traxy (sic) was not received at Twizza Queenstown.

Credit note TATC-59 was received from Traxy for this load."

60. It is not clear whether Mr. Potgieter had been briefed on this document because he was not referred to it in his evidence-in-chief and he fell about in the witness box somewhat under cross-examination while trying to give context to the letter. He confirmed that Ms. Aylwin (who no longer worked for Twizza) was the person who would have had knowledge of a missing load in the course of her duties. He further explained that this document was drafted some 20 months after the Banzi load allegedly went missing and was sent after a request from Traxys.

61. While it appeared as if Mr. Potgieter, at one stage of his cross-examination, believed that the document was written to explain non-receipt of the Banzi load, the date of delivery and the permit number presented obvious problems for Twizza. The document is manifestly wrong if it was intended for that purpose as the harbour permit for the missing Banzi load was numbered 4293, as explained by Mr. Rampersada, and the date of delivery would have been on 11 May 2017 (or 12 May 2017 at the latest) given that the truck allegedly left the MFT warehouse at 17h40 on 10 May 2017.

62. Mr. Potgieter ultimately suggested that this letter was probably intended to refer to a different lost load. That answer poses the question why the letter was discovered and included in the witness bundle if it had no relevance to the alleged lost Banzi load. It was certainly not relied upon by Banzi to show that the phenomenon of missing loads was not an infrequent occurrence and thus tendered as similar fact evidence.

63. Mr. Herholdt, on the other hand was adamant that the Twizza letter was written to establish non-delivery of the Banzi load, claiming that the incorrect harbour permit number was in all likelihood a misprint. However, such a misprint would not explain the different date of delivery or the credit note reference number.

CONCLUSION ON THE ISSUE OF NON-DELIVERY

64. In my view, Banzi did not adduce sufficient evidence to discharge the burden of proof it bore to show that Tradevest breached the terms of the Banzi load con by failing to deliver the load of sugar to Twizza. The documentation it relied upon was largely hearsay and ultimately equivocal. The viva voce evidence presented by Banzi did not go far enough either. Importantly, Banzi did not take the most basic step of calling the responsible person(s) at the Queenstown factory to testify regarding the non-delivery of a load of sugar that was ordered, loaded, expected for delivery and which ultimately allegedly did not arrive. Surely, it must be asked rhetorically, there was an administrative system in place in terms whereof the entry of such a sizeable load onto the premises, and its subsequent storage in a warehouse, was recorded so that Twizza had proof of its receipt of the load when Traxys asked for payment

thereof. One is reminded in this regard of the cautionary words of Nienaber JA in SFW Group[13]

"[1] Recollection can be fallible. And in business the failure to confirm an event promptly on paper can be fatal."

65. On the other hand, Tradevest could no doubt have called the driver (be it Norman, Lucky or A.N.Other) to testify that the load had been delivered to Twizza as required under the Tradevest load con. But, to be fair, Tradevest attracted no onus to establish delivery and its failure to call the driver is not fatal to its case. Moreover, the fact that Tradevest also adduced a slew of hearsay evidence in support of its allegation that delivery took place notwithstanding the absence of the POD, does not assist Banzi, which had the onus to establish the material disputed allegation made in its particulars of claim – non-delivery to Twizza.

66. Looking at the matter from the angle of the probabilities, it is indeed strange that the allegations of non-delivery only arose more than a year after the date of delivery when questions were being asked by Traxys of MFT about payment for its sugar and when MFT in turn looked to its co-contractant (Banzi) for an explanation. One must also bear in mind, too, that there was mention in the evidence on both sides of insurance cover (or really the lack thereof, in the case of Tradevest) and that this factor may also account for the disappearance of the load only coming to the fore at

[13] Stellenbosch Farmers Winery Group Ltd and another v Martell et Cie and others 2003 (1) SA 11 (SCA) at [1]

that stage – when insurance claims were being submitted to, or assessed by, insurers.

67. But the most puzzling aspect of all is that if a load of sugar of this mass did not reach its destination as planned, one would have expected that Twizza would have anxiously been asking questions almost immediately because it would have had an unfilled space in its warehouse and a possible disruption to its production line. Also, the disappearance of such a large load (whether through theft or a high-jacking) would no doubt have merited the attention of the police.

68. However, since there is a paucity of admissible and reliable evidence adduced by either party to establish delivery or non-delivery (as the case may be) on a balance of probabilities, it cannot be said that there were two irreconcilable versions placed before the court *a quo* and it is therefore not permissible to consider where the probabilities lie.[14]

69. In the circumstances, the evidence is simply not of a satisfactory or persuasive standard and I consider that the court *a quo* erred in finding for Banzi. The judgment in its favour accordingly falls to be set aside. I shall revert to the appropriate order to be made on appeal later.

QUANTUM OF PLAINTIFF'S DAMAGES CLAIM

70. In the event that I am wrong in relation to the finding on the merits of Banzi's contractual claim, I turn to the question of quantum. As already stated, the

---

[14] SFW Group at [5]

court *a quo* found that the plaintiff had established damages in the sum of R354 460,20, being -

"the value of the sugar at the time of the load which was not delivered by Tradevest to Twizza, Queenstown" which the court calculated to be "34 metric tons @R9145.00 (excluding Vat) per metric ton."[15]

71. The basis for the finding by the court *a quo* that the plaintiff had suffered damages is that

"(a)s a result of the breach of the contract Banzi has suffered a loss. It is now obliged to pay the replacement value of the load to its customer MFT."

The finding that Banzi suffered a loss is predicated on two issues – whether the future obligation to pay money to MFT constitutes damage *per se* recoverable by Banzi from Tradevest, and then further, whether the evidence placed before the court *a quo* sustains the alleged obligation to pay.

72. At the outset, it must be said that there can be no debate about the court *a quo's* finding that Tradevest attracted liability for any loss or damage to the load of sugar which it had undertaken to transport on behalf of Banzi from Durban to Queenstown. As already pointed out, such liability arose contractually from clause 4 of the Banzi load con and, in any event, from the operation of the law relating to the carriage of goods and the principles pertaining to *depositum.*

[15] The sum of R354 460.20 was correctly calculated as 34 x R9145.00 + R43 530.20 (VAT at 14%)

APPROACH TO THE ASSESSMENT OF CONTRACTUAL DAMAGES

73. It is trite that a contracting party which claims damages arising from breach of contract[16] must prove that it actually suffered damage or loss. In order to succeed in that regard, the injured party would ordinarily be permitted to prove its damage by comparing the extent of its patrimony as a consequence of the breach with the position it would otherwise have been in had the breach not occurred.[17] If there is a difference between the two positions, that would constitute the injured party's damage, thus entitling it to recover damages from the breaching party.

74. The traditional approach to the quantification of damages was usefully summarized as follows by Jansen JA in his judgment in ISEP at 8A.

"The basic principle in the assessment of damages for breach of an obligation arising from contract was formulated as follows by Innes CJ over 65 years ago:

> "*The sufferer by such a breach should be placed in the position he would have occupied had the contract been performed, so far as that can be done by the payment of money, and without undue hardship to the defaulting party."*

(*Victoria Falls and Transvaal Power Co. Ltd v Consolidated Langlaagte Mines Ltd* 1915 AD 1 at 22).

The rule can also be stated thus: the defaulting party must compensate the plaintiff, so far as that can be done by the payment of money, for the damage (patrimonial loss) suffered by him

---

[16] For the sake of convenience, I will refer to this as "the injured party".

[17] Swart v van der Vyver 1970 (1) SA 633 (A) at 643B *et seq.*

as a result of the breach. Then 'damage', in order to conform to the aforementioned test, will be defined in the terms adopted by the majority in *Swart v Van der Vyver* 1970 (1) SA 633 (A) at 643D:

> '*Die vermoensskade ingevolge kontrakbreuk gely, word normaalweg bepaal deur 'n vergelyking van die bestaande vermoensposisie van die skuldeiser met die waarin hy so gewees het indien geen kontrakbreuk plaasgevind het nie.*' "

75. As regards the date for the assessment of damages, the general rule was held in Rens[18] to be the date of performance, but that date may be determined to be later in appropriate circumstances.

"The application of this rule will ordinarily require in many cases, typically the case of a breach of contract of sale by the purchaser, that the date for the assessment of damages be the date of performance, or as it has often been expressed, the date of the breach. But even in contracts of this nature, there is no hard and fast rule (cf *Culverwell and another v Brown* 1990 (1) SA 7 (A) at 30G - 31 H) and in each case the appropriate date may vary depending on the circumstances and the proper application of the fundamental rule that the injured party is to be placed in the position he would have occupied had the agreement been fulfilled. The position is the same in England. In *Miliangos v George Frank (Textiles) Ltd* [1975] 3 All ER801 (HL) Lord Wilberforce recognized that '*as a general rule in English law damages for tort or for breach of contract or assist as at the date of the breach'* but in the same passage emphasized that the general rule did not preclude the Courts in particular cases from damages as at some later date."

---

[18] Rens v Coltman 1996 (1) SA 452 (A) at 458E-H

76. In the present matter the injured party alleged that as a consequence of Tradevest's breach (in the form of the failure to deliver the load to Twizza in accordance with its obligation under the Banzi load con), it was liable to MFT for the value of the load. Banzi's liability to MFT, in turn, was said to flow from its contract with MFT, the terms, whereof, which are set out fully in the Stafford Law letter, do not appear to be in dispute. Hence, the letter alleged, Banzi was entitled to subcontract the delivery of the load to a subcontractor of its (Banzi's) choice but, notwithstanding the entitlement to so subcontract, it accepted the risk of MFT's goods during transit at the cost price thereof. This liability to MFT is not affected by clause 4 of Banzi's agreement with Tradevest in terms whereof Tradevest became liable to Banzi for the loss of the goods.

77. Banzi's claim was thus in respect of damage which it anticipated it would suffer when MFT sought to hold it liable under the contract alleged in the Stafford Law letter. As Van der Merwe et al[19] suggest –

"In actual fact, the courts do not always make use of a comparison between a hypothetical and an actual total patrimony in order to assess damage. Much rather, they follow a *concrete* approach to the question of damage by focusing on the particular elements of the estate that are affected. According to the concrete approach, damage occurs whenever, as a consequence of an uncertain or unplanned event, the use of an asset is forfeited; a particular asset is lost or reduced in value; **a particular liability (that is, a debt) is incurred or increased**, or an expenditure becomes useless.… Liabilities or debts are not only liabilities that have resulted from the uncertain event complained of but also liabilities or expenses that

[19] Van der Merwe, van Huyssteen, Reinecke and Lubbe Contract, General Principles 4th ed. at 358 - 9

will inevitably result from the event and which can be regarded as both necessary and reasonable." (Emphasis added; internal references omitted)

78. The issue as to whether a prospective liability constitutes part of an injured party's patrimony was discussed by the Appellate Division in Jonnes[20]. The case involved the interpretation of a contract for the sale of shares which contained the following term –

"You shall indemnify me against any loss or damage I might suffer by reason of any other guarantees given by me on behalf of…."

At issue in that matter was whether a suretyship put up by the appellant prior to the sale of shares agreement was intended to be covered by the indemnity.

79. A dispute arose between the parties as to the proper meaning and extent of the indemnity. In the result, the focus of the judgment was on the principles of contractual interpretation applicable at that time. However, in the latter part of his judgment dealing with the probabilities of the matter, Potgieter JA addressed the argument of counsel and made the following comments, which are relevant to this matter.

"But, contends Mr. Maisels [for the respondent], such a construction would do violence to the words 'any loss or damage I might suffer.' In the first place he submitted that the words 'any loss or damage' can only mean actual loss in the sense that the plaintiff has already parted with money without or after recourse to the principal debtor and co-sureties. The probabilities adverted to above are similarly not in accord with such a narrow meaning of those words.

---

[20] Jonnes v Anglo-African Shipping Co. (1936) Ltd 1972 (2) SA 827 (A) at 837 B-E

Moreover, I agree with Mr. Didcott [for the appellant] that one's estate or patrimony consists not only of corporeal assets, but also of the balance between the value of one's incorporeal assets and the extent of one's incorporeal liabilities and one's estate is therefore diminished by the increase of one's incorporeal liabilities (cf. *West Wake Price & Co. v Ching* (1956) 3 All E.R. 821 (Q.B.) at p.825D). It seems clear, therefore, that the words 'loss or damage' may bear the meaning of loss or damage sustained as a result of an inescapable obligation to pay money even before the money is actually paid. As pointed out above, the probabilities favour such a meaning. In this connection I may add that it is not insignificant that the all-embracing word 'any' is used."

80. The learned Judge of Appeal then dealt with the argument that the word "might" in the indemnity suggested only an actual payment made by the respondent at a time in the future.

"This contention cannot be sustained. It loses sight of the fact that the plaintiff's liability to pay under his suretyship only arises when the debtors fail to pay and plaintiff is called upon by the creditors to pay. Plaintiff's mere liability to pay therefore also postulates futurity. Consequently the word 'might' is equally appropriate when applied to the construction contended for by Mr. Didcott.

In support of his contention that the words 'loss or damage' only connote a loss in the sense that money is already parted with, Mr. Maisels posed the following question: one of the creditors called upon plaintiff to pay; he refused to pay and the creditor did nothing further; did plaintiff then suffer any loss? Of course not. But such an eventuality is so unrealistic and unlikely that one can safely assume that it could never have been contemplated by the parties. In any event, in those circumstances, there would be no inescapable liability to pay.

Van der Merwe et al [21] comment on Jonnes and suggest that it might be correct to refer, in this context, to “debt expectancies” (or “skuldverwagtinge”) that will inevitably materialize as liabilities in a party’s patrimony.

81. It seems to me therefore that when determining the extent of an injured party’s patrimony after a breach of contract has occurred, consideration may be given to the injured party’s debt expectancies, but then, as Potgieter JA postulated in Jonnes, the liability to pay must arise from an “inescapable obligation”.

82. What are the facts here? There is no debate that Banzi was contractually bound to MFT to transport its load of sugar and that it was contractually bound to accept the risk in relation to any loss thereof. In his evidence, Mr. Albrecht said that, although Stafford Law had demanded payment of the sum of R357 569,50 by Banzi in June 2019, at the time that he testified in October 2020, no further steps had been taken against his company.

83. Mr. Albrecht went on to say under cross-examination, when asked by Ms. Manser what damages Banzi had actually suffered, that he considered himself bound to settle Banzi’s alleged indebtedness to MFT because if he did not do so, MFT would no longer do business with Banzi. Counsel then correctly pointed out to Mr. Albrecht that it was not part of Banzi’s claim against Tradevest that it had suffered damages “because [its] relationship was ruined.” The witness accepted the proposition.

---

[21] At 359 fn253

84. Mr. Albrecht further stated that, as far as he was concerned, any money that Banzi might recover from Tradevest in this litigation would be paid over to MFT. In fact, he went so far as to suggest that Ms. van der Berg could pay the money over directly to MFT.

85. Ms. Manser then traversed the issue of the prescription of MFT's claim against Banzi, pointing out that at that stage (October 2020) the claim had clearly prescribed. To this Mr. Albrecht said that Banzi would not shirk its commercial responsibility, as "I will know it is *skelm.* That is not the way to operate it. That is not the way it work (sic)."

86. The problem with the approach adopted by Banzi to the MFT claim is, firstly, that there has been no unequivocal admission of its liability to MFT in respect of the allegedly lost load of sugar: no correspondence was produced by Banzi to establish that it acknowledged the claim and would not plead prescription. Secondly, there is no evidence that MFT has issued summons to stop the running of prescription in respect of Banzi's alleged debt. On the contrary, as matters presently stand, the debt owing to MFT appears to have prescribed. Thirdly, there is the concern that if Banzi recovers the cost of the load of sugar from Tradevest and MFT fails to take further steps, Banzi will not only have not suffered any damages but will in fact have been enriched. It is not inconceivable that Mr. Herholdt, notwithstanding his honest assurances in the witness box, might be advised by lawyers acting for Banzi that there is no basis for the corporation to settle MFT's debt should it proceed to litigation.

87. In the result, I am driven to conclude that Banzi failed to establish the requisite degree of inevitability of its future, contingent obligation to MFT. In the

circumstances, it follows that Banzi has not adduced sufficient evidence to sustain the damages it claims to have suffered.

CONCLUSION

88. In the light of my findings that Banzi's evidence before the court *a quo* did not sustain the finding of damages in its favour, the judgment falls to be set aside. In such circumstances, this Court is permitted, under s87(a) of the Magistrates Court Act, 32 of 1944

"to confirm, vary or reverse the judgment appealed from, as justice may require"

S19(d) of the Superior Courts Act, 10 of 2013, is in similar vein providing that the court hearing an appeal may –

"confirm, amend or set aside the decision which is the subject of the appeal and render any decision which the circumstances may require."

89. So what order should this Court make in the circumstances? I have found that Banzi did not adduce sufficient admissible evidence to prove non-delivery of the load to Twizza. On the assumption that there is a vague prospect that it may yet be able to conclusively establish non-delivery, I believe that it would be in the interests of justice to permit Banzi to do so. An order granting absolution from the instance at the conclusion of the defendant's case may be made in circumstances where the possibility exists that a plaintiff who bears the onus of proof in the matter might

successfully discharge that onus by establishing other facts.[22] The same approach would apply to the issue of damages, in the event that I am wrong in regard to the finding on the merits of Banzi's claim.

IN THE RESULT, THE FOLLOWING ORDER IS MADE:

A. The appeal succeeds with costs.

B. The order of the Regional Magistrate, Somerset West is set aside and replaced with the following:

"There will be absolution from the instance with the plaintiff to pay the costs."

_____

GAMBLE, J

I AGREE.

_____

LE ROUX, AJ

[22] Damont NO v Van Zyl 1962 (4) SA 47 (C) at 52G-H; Mills Litho (Pty) Ltd v Storm Quinan t/a 'Out of the Blue 1987 (1) SA 781 (C) at 786H-I

APPEARANCES

Appellant:

Ms. V. Manser
Instructed by Malan Lourens Viljoen Inc
Somerset West
c/o Macgregor Erasmus Attorneys
Cape Town.

Respondent:

Mr. M.A.Basson
Instructed by BDP Attorneys
Tygervalley
c/o Goussard Coetzee & Otto Inc
Somerset West.