IN THE HIGH COURT OF SWAZILAND

CIVIL CASE NO.2710/01

In the matter between:

SPEEDY OVERBORDER SERVICES (PTY) LTD	PLAINTIFF
VS	
IRIS FIGUEREDO t/a PRESTIGE MARKETING	DEFENDANT
CORAM	SHABANGU AJ
FOR PLAINTIFF	MR. ZWANE
FOR DEFENDANT	MR. MAZBBUKO

JUDGMENT 22nd January, 2004

The plaintiff commenced proceedings before this court by way of action claiming:

1. Payment of E30,213-26;
2. Invest thereon at the rate of 9 percent per annum calculated from the date of issue of summons to date of payment;
3. Costs of suit;
4. Further and/or alternative relief.

In support of its claim for the aforementioned relief the plaintiff has pleaded the following in the relevant paragraphs of the declaration. In this regard I refer to paragraphs four to six as follows.

"4. In the period from April, 2000 up to May, 2001 plaintiff rendered transportation services to the defendant at different intervals and accordingly sent invoices to her for such services in order for her to pay.

5. Despite such invoices being sent to her, defendant neglected and/or failed to make full payment for amounts indicated on such invoices.

6. The amounts owing in respect of the invoices not paid for by the defendant accumulated to the total of E30,213-26. Annexed hereto is a statement indicating invoices sent to defendant and amounts in respect thereto and the total amount due marked "A".

7. Despite demand for payment of such amount the defendant has failed and/or refused to pay."

Paragraphs one and two of the declaration contains as usual a description of the parties to the action. Then there is paragraph which states only that, " This court has jurisdiction over this matter." There is no allegation of some agreement or contract which may have provided a possible basis for the alleged provision of transport services by the plaintiff to the defendant. For all intents and purposes the basis upon which the plaintiff allegedly provided these services may as well have been as a negotiorum gestor. The pleadings do not set out a complete and clear cause of action for the amount claimed. The absence of an allegation of an agreement together with the terms relating to an agreed remuneration means that it is possible that the cause of action upon which the plaintiff intended to rely may be the negotiorum gestor. If the plaintiff intended to base its claim on negotiorum gestor it is not entitled to remuneration for the transport services rendered to the defendant. See WILLIAM'S ESTATE V. MOLENSCHOOT & SCHEP (PTY) LTD 1939 CPD 360, (see also GIBSON SOUTH AFRICAN MERCANTILE AND COMPANY LAW 7th EDITION page 209). The plaintiff as negotiorum gestor will be entitled only to his necessary or useful expenses, provided he has not spent more than

the owner himself would have spent. On the other hand if the transport services were alleged to have been rendered on the basis of a carriage agreement, which agreement is a species

3

of the agreement of letting and hiring of work, in other words the locatio conductio opens, the plaintiff would be entitled to claim the agreed remuneration in accordance with and on the basis of the principles applicable to contracts of letting and hiring of work, the locatio conductio opens. On either of this possible causes of action the plaintiff's declaration does not contain sufficient allegations to sustain a cause of action based on either the carriage contract or on negotiorum gestor. In so far as the carriage contract as a possible basis for the relief claimed there is completely no allegation of an agreement to pay remuneration for the transport services provided, (see L.T.C. HARMS AMLERS PRECEDENTS OF PLEADING, 1988 edition page 522). Further, there are no averments relating to the terms upon which the parries agreed on the conveyance of the defendant's good by the plaintiff. In so far as the negotiontm gestor as a possible cause of action for the relief claimed there is no allegation that when the plaintiff administered the affairs of the defendant by providing transport services, the defendant was ignorant of the fact that his affairs were being managed on his behalf. All that the plaintiff alleges is that it "rendered transport services to the defendant at different intervals and accordingly sent invoices to her for such services in order for her to pay." This is no doubt a bad pleading to say the least. However, there was no exception taken by the defendant to the pleading. At this stage I need not say more on this aspect of the case.
The defendant who did not take any exception to the plaintiff's declaration actually makes some of the essential averments required of the plaintiff in its declaration. The defendant unnecessarily pleads what appears to have been a carriers contract. The onus of pleading such a contract would normally have rested on the plaintiff who in accordance with the ordinary rules of pleading would have been obliged to allege in its pleadings and prove at the trial not only the carriers contract but the releant terms which entitled the plaintiff to the amount (remuneration) claimed. In paragraph two of its plea the defendant pleads in response possibly to me allegation contained in paragraphs four to seven of the declaration. 1 say possibly because paragraph two of the plea erroneously expresses itself to be a response to paragraph three of the declaration. Paragraph three of the declaration as already observed above is the paragraph wherein the plaintiff states.

4

"this court has jurisdiction over this matter," Further in any event the first paragraph of the defendant's plea also appears to be a response to paragraph one to three of the plaintiff's declaration and the contents of paragraph one to three of the plaintiff's declaration are admitted in paragraph one of the plea. The pleadings by both sides indicate not only a total disregard of the principles and rules relating to pleadings by the parties in this case but it also exhibits a lack of caution in the draft of pleadings. I will regard paragraph two of the plea as a response to paragraphs four to seven of the declaration. The "relevant" paragraphs of the defendant's plea are paragraphs two to four. In paragraphs 2.1 to 2.8 the defendant pleads as follows:

"2.1 About the 4th May, 2001 the defendant engaged the plaintiff to transport goods from South Africa to deliver same at the business premises of the defendant in Swaziland on the 5th May, 2001.

2.2 The plaintiff undertook to defendant to that (sic) it will carry out a twenty four courier service between South Africa and Matsapa. On the strength of the plaintiff's undertaking an agreement was entered into between plaintiff and defendant as stated in clause 2.1 above.

2.3 At all material times hereto the defendant had a credit facility with plaintiff in terms of which plaintiff will carry out an overnight courier service and deliver the goods to the defendant and issue an invoice at a later stage.

2.4 On the 5th May, 2001 the plaintiff failed to deliver the goods to defendant
contrary to the agreement with the defendant.

2.5 The defendant on several occasions demanded a release of the goods but plaintiff failed or refused to deliver same.

2.6 The plaintiff delivered a portion of the defendant's goods at defendant's premises at about 24th August, 2001.

2.7 The plaintiff delivered another portion of the defendant's premises (sic) in Matsapa about 28ih August, 2001.

2.8 The deliveries made by plaintiff is incomplete as some of the defendant's goods are still withheld by plaintiff. Also at the time of the deliveries aforementioned the said goods had been damaged, others expired as they were kept in unfavourable condition. The said goods were no longer fit for purposes intended."

Then in paragraphs three and four the plea states.

5

a3. The defendant denies that she is indebted to plaintiff in the amount claimed or at all. The defendant further denies that plaintiff performed in accordance with the contract and put plaintiff to proof thereof

4. The defendant avers that she did pay plaintiff what was due and denied the balance of the claim."

On the basis of the aforegoing plea the defendant prays for a dismissal of the plaintiff's claim with costs.

From the defendant's plea it emerges for the first time that there was a carriers agreement between the parties. However, the defendant's plea does not appear to specify the date of the agreement. It does not even specify whether the agreement was oral or in writing as is required by Rule 18 of the Rules of this Court. Inspite of this, no fault can be laid at the defendant's door in this regard because it was not the defendant's business to plead such agreement in the first place. The onus to allege in the pleadings the existence of this agreement and to prove such agreement at the trial was borne by the plaintiff. A further difficulty in the way of the plaintiff which appears on the pleadings is that on the assumption that paragraph two of the plea is directed to paragraph four of the declaration most of paragraph two of the plea seems to suggest that the defendant only engaged the plaintiff on or about 4th May, 2001 for the purposes of conveying the defendant's goods from South Africa to the business premises of the defendant in Swaziland and that such goods were in terms of that engagement supposed to be delivered the next day on 5th May, 2001. It is not clear on the plea' what specific and particular allegations of paragraph four of the declaration are being denied. As already stated above other than the denial by the defendant that the plaintiff's performance was in accordance with the "contract" the defendant also pleads that she is not indebted to the plaintiff and that "she did pay plaintiff what was due and denies the balance of the claim." This is how the pleadings are formulated in this matter.

At the trial the evidence which was led revealed the following. The plaintiff's business is that of a carrier offering services to the public for the conveyance of goods between Swaziland and South Africa. The plaintiff has indeed provided carriage services to the

6

defendant for some time between April, 2000 to at least May 2001. This turned out to be common cause. The plaintiff referred in its evidence to annexure "A" of its declaration which is a statement of account dated 31st July, 2001 reflecting a summary of a list of invoice numbers and debits made by the plaintiff to the defendant in respect of each of the invoice numbers. There is also a credit column on the statement which reflects that one payment of E2000 (two thousand Emalangeni) was made on 6th February, 2001. The total amount reflected to be owing from the defendant to the plaintiff amounts to E30,213-26 which is the amount claimed in the summons. At the commencement of the trial however both parties informed me that plaintiff was no longer claiming the aforesaid amount of E30.213-26. The amount claimed by the plaintiff at the commencement of the trial was less an amount of E9,175-92 which the defendant paid by cheque to the plaintiff on or about 26th October, 2001 under cover of a letter written by defendant's attorneys of the same date. It appears that this amount was paid by the defendant after the plaintiff had issued summons commencing this

proceedings against the defendant. In paragraph two of the letter dated 24th October, 2001 the defendant's attorneys describe the payment as follows:

"2. Our client will pay what she believes is fair and defend the balance of your client's claim. A cheque for E9,175-92 (nine thousand one hundred and seventy five (sic) ninety two cents) is enclosed in settlement of what our client agrees to pay."

According to the defendant the agreement was that the plaintiff was to convey goods from South Africa to the defendant's premises for remuneration. He does not say what the agreed remuneration was or how it was going to be calculated in accordance with the terms of the agreement. The defendant however does state and this appears to be common cause that the initially agreed terms of payment were chat payment was to be within thirty days from presentation of invoice. A problem arose when the defendant's child got sick and the defendant had a huge medical bill to attend to. Arising from this, it is common cause the plaintiff and defendant altered the aforementioned arrangement as to payment. The new agreed terms of payment were that the defendant was to pay as and when she was able to until the problems occasioned to her business as a result of her sickly child were resolved. It is also common cause that there was no fixed instalment. The witness called by the plaintiff also gave a substantially similar version of the

agreement reached by the parties on the revised terms of payment. The plaintiff's witness was however not present when the revised terms of payment were agreed upon between the parties. When the revised terms of payment were agreed upon, the plaintiff was represented by one Willy Stewart. The plaintiff's witness testified that on 5th May, 2001 the plaintiff rejected an amount of E3000 (three thousand Emalangeni) which the defendant tendered as payment. The reason offered by the plaintiff for rejecting the payment is that the amount was too little considering the defendant's alleged indebtedness to the plaintiff. The rejection of this payment appears to have coincided with the last transaction between the parties which is the one referred to in the defendant's plea. It appears that in terms of this transaction the plaintiff had undertaken to transport and convey goods belonging to the defendant from South Africa to the defendant's business address in Swaziland, in Matsapa. Even though the plaintiff accepted the obligation to convey the defendant's goods from South Africa to Matsapa it is clear that the plaintiff did not deliver the defendant's goods at the premises as agreed or at least as expected. In fact it is common cause that the plaintiff refused to deliver the goods unless the amount of E30,213-26 was paid to it. According to the defendant's evidence which was uncontroverted the goods consisted of stock the cost value thereof was El 1,884-86 this being the amount at which the defendant bought the goods from South Africa. Indeed this figure was confirmed by the plaintiff's own witness who apparently had in her possession an invoice reflecting the cost price of the goods to the defendant as E11,884-86. When the plaintiff's witness divulged this she was being cross-examined by the defendant's attorney who put to her that the value of the stock transported by the plaintiff on 4th May, 2001 was R19,610-06. From the rest of the evidence it is apparent that though the defendant had purchased the stock at a cost price of El 1,884-86 its retail value in Swaziland based on the defendant's mark-up of E7,175-25 was E19,610-06. In fact the evidence of the defendant even as contained in exhibit "P1" is that there were already specific orders from defendant's customers for these goods at this retail price(s). The defendant had apparently ordered the goods in order to meet specific orders already made to her by her customers, It is also the uncontroverted evidence of the defendant that because of the retention of the goods by the plaintiff under unfavourable conditions they got spoiled and damaged, as a result they were unfit for the

purpose for which they were purchased and the defendant had to throw them away. In line with her evidence is a summary of the result of the plaintiff's conduct in retaining the goods which is contained in paragraphs three and four of the letter by her attorneys dated 24th October, 2001 to the plaintiff's attorneys wherein it was stated .

"3. The stock which your client unlawfully kept at its warehouse for four months (i.e. 4th May, to 4th August, 2001) was dumped by your client on the 24th August, 2001. At the time that stock was dumped at our client's premises it was incomplete. On the 28th August, 2001 your client dumped some goods but still the goods were incomplete. It appears that your client is still in possession of

some of our client's goods. At a meeting with Mr. Zwane it was pointed out that a lot of goods are still missing.

4. Even the goods that were dumped at our client's premises had been damaged and were no longer good for the purpose for which they were purchased. Further the goods were ordered for specific orders. Since your client kept the goods unlawfully the orders were cancelled. These goods are still lying where they were dumped. These goods are perishable within a very short period of time. These are issues that our client brought to your attention with a view to settle the matter out of court."

The defendant's evidence is that on several occasions she went to the plaintiff's premises to explain that their retention of the goods in the conditions under which they were kept would result in them completely getting spoiled and losing their value. She says she actually showed the plaintiff's witness on one occasion that some of the goods were already spoiled at an early stage. When the defendant's complaint and aforementioned explanations about the deteriorating condition of the goods fell on deaf ears she says she actually telephoned Mr. Willy Stewart and enquired whether she was expected to accept that the plaintiff was retaining her goods in full and final settlement of whatever the plaintiff alleged was owed by her to the said plaintiff. She says that the line went silent on the other side until plaintiff's representative hung up without answering. Nevertheless following enquiry the plaintiff continued to hold on to the goods for a long time until about 24th and 28th August, 2001 on which dates the plaintiff simple dumped the goods at her premises. They did not require here to sign a delivery invoice as was the usual practice. It may be of some importance to note that according to the statement which is annexure "A" of the plaintiff's declaration the plaintiff's charges in respect of the conveyance of these goods would have been El,427-28 (one thousand four hundred and

twenty seven Emalangeni twenty eight cents). The aforesaid annexure appears to be a document produced from a computer. The date which appears on it as 31st July, 2001 is a date on which it was produced. The statement is addressed to Prestige Marketing, at an incomplete address because the number of the post office box number is not stated. In light of this it is not strange that the defendant says she never received same until on or about the date of commencement of these proceedings.

That is the brief summary of the material portions of the evidence given at the tiral. Questions may arise on whether it may be proper to take into account some aspects of the evidence having regard to the manner the pleadings have been drawn. In such a situation the question is always whether all aspects of the issue which is not properly and timeously raised on the pleadings have been fully investigated. In MIDDLETON V. CARE. 1949(2) SA 374 AD a matter which involved inter alia a claim for remuneration in respect of services rendered, the learned Judge Schreiner JA stated:

"I turn now to ground (b), under which the appellant claims thai failing proof of the express contract for remuneration at the rate of thirty pounds per month he is nevertheless entitled to payment at a fair or reasonable rate for the services which he rendered. The learned Judge refused to make such an order in the appellant's favour because there was in the declaration no claim alternative to that based on the express contract and because even if there had been such a claim the evidence was insufficient to warrant a judgement for remuneration at any particular rate. The two points are not unconnected because, as has often been pointed out, where there has been full investigation of a matter, that is, where there is no reasonable ground for thinking that further examination of the facts might lead to a different conclusion, the Court is entitled to, and generally should, treat the issue as if it had been expressly and timeously raised. But unless the court is satisfied that the investigation has been full, in the above sense, injustice may easily be done if the issue is treated as being before the court. Generally speaking the issues in civil cases should be raised on the pleadings and if an issue arises which does not appear from the pleadings in their original form an appropriate amendment should be sought. Parties should not be unduly encouraged to rely, in the hope, perhaps, of obtaining some tactical advantage or of avoiding a special order as to costs, on the court's readiness at the argument stage or on appeal to treat unpleaded issues as having been fully investigated. "

In light of the above quoted passage from Schreiner JA's judgment I shall not hold against the plaintiff the fact that che plaintiff's declaration does not allege any agreement,

because the agreement is raised, even though, inappropriately by the defendant in her plea. I will therefore take into account the aspects of the evidence which relate to the agreement. In any event it does appear to be common cause that there was an agreement, even though no allegation is made at all whether the agreement was in writing or oral. The fact that there was an agreement excludes the possibility that this may have been a case of negotiorum gestor.

One item that is clearly lacking in both the pleadings and the evidence is an agreement as to remuneration. The question arises therefore whether the plaintiff can obtain judgment at any rate, even if fixed by the court as reasonable remuneration, in light of both the pleadings and the evidence led at the trial. What is clear though from the evidence and even from the pleadings is that remuneration was payable. This may be inferred from the plaintiff's declaration wherein it is stated at paragraph four that the plaintiff "sent invoices to her for such services in order for her to pay," read with paragraph 2.3 of the plea wherein the defendant states –

"At all material times hereto the defendant had a credit facility with plaintiff in terms of which plaintiff will carry out an overnight courier service and deliver goods to the defendant and issue an invoice at a later stage."

From both these statements in the pleadings it is not sufficiently made clear that remuneration was payable. If this statements are read in the context of the evidence it is possible to infer that the parties accepted that remuneration was payable. From this it follows that the agreement was a contract of carriage, a species of the contract of letting and hiring, in these case of work, otherwise known as locatio conductio opens. See GIBSON, J.T.R, WILLE'S PRINCIPLES OF SOUTH AFRICAN LAW 7th edition page 448, pages WILLE & MILLIN'S MERCANTILE LAW OF SOUTH AFRICA 7th EDITION page 478. See also LTC HARMS, AIMLER'S PRECEDENT'S OF PLEADING 3rd EDITION 52 and 190. Gibson supra at 449 defines the contract of carriage as follows:

"A contract of carriage is concluded when the parties have agreed upon the following essential points: the persons or goods to be carried; the place of departure and the destination; and the fare or freight, or the method of

calculating the same. At common law the contract may be made orally, but it is customary for all important contracts of carriage to be made in writing. "

Similarly in Wille and Millin supra at page 478, the learned authors state the following to be essential terms of carriage contract,

"In order that a contract of carriage under the common law be binding on the parties, they must definitely agree on the following three points: (1) what is to be carried, (2) from what place to what destination it is to be carried, and (3) for what price or freight When these essential points have been agreed upon the contract is complete. The agreement may be made orally and it is not necessary that it be writing."

From the above quoted passages one thing is clear, that is, that one of the essential requirements of a carriage contract is that there must be an agreement regarding remuneration. If no remuneration is payable in terms of the carriage agreement the contract is a deposit or a gratuitous mandate. (See GIBSON WTLLE'S PRINCIPLES OF SOUTH AFRICAN LAW 7th EDITION page 448. WILLE & MBLLIN'S MERCANTILE LAW OF SOUTH AFRICA 7th EDITION page 478. '

Regarding the terms of agreement relating to remuneration HARMS LTC, IN

AIMLER'S PRECEDENTS OF PLEADINGS 3rd EDITION AT PAGE 191 says:

"The plaintiff must allege and prove (a) that remuneration was, in terms of the contract, payable and (b) the amount of the remuneration payable in terms of the contract. As far as (a) is concerned, remuneration is payable if nothing was said about remuneration. It is implied that that in such circumstance the remuneration will be a reasonable one. It is for the plaintiff to prove that nothing was

said concerning remuneration. An allegation by the defendant that the plaintiff undertook to do the work free of charge does not place any onus upon the defendant. DAVE V. BIRREL 1936 TPD 192; CHAMOTTE (PTY) V. CARL COETZEE (PTY) LTD 1973(1) SA 644 A at 649; INKIN V. BOREHOLE DRILLERS 1949(2) SA 366 (A). It may be prudent to allege, in the alternative to an agreed rate, a tacit term of a fair and reasonable remuneration. If that is not done, and the issue is not fully canvassed, the court may be unable to fix the rate and the plaintiff may fail. MIDDLETON V. CARR 1949(2) SA 374 (A) at 385-386. The claim for a reasonable remuneration based upon an implied term should be distinguished from such a claim based upon unjust enrichment where allegations of enrichment and acceptance of the benefits by the defendant must be made."

12

Even though LTC Harms supra says that remuneration is payable where nothing is said about remuneration and that it is implied in such circumstance that the remuneration will be at a reasonable rate, it is clear from the above quoted passage by the learned author that in order to succeed the plaintiff must allege and prove (a) that remuneration was, in terms of the contract, payable and (b) the amount of the remuneration payable in terms of the contract. If the agreement did not expressly fix the amount of the remuneration and the plaintiff wishes to rely on a tacit term of a fair and reasonable remuneration, such term must be alleged in the pleadings and be proven during the trial. In the present case there is neither an allegation of an express term of the agreement fixing the remuneration for the services rendered nor is there an allegation of an implied term that the plaintiff would receive a fair and reasonable amount as remuneration. Further the evidence does not at any stage contain even a reference to either an expressly agreed remuneration let alone an implied or tacit term for a fair and reasonable remuneration.

Finally there is no evidence at all led during the trial upon which I may be able to fix a fair and reasonable remuneration. There has not even been an attempt at all to canvass these issues.
In the circumstances the plaintiff's claim cannot succeed and it is dismissed with costs.

A.S. SHABANGU

Acting Judge