CASE NO. (P) I 672/2007

IN THE HIGH COURT OF NAMIBIA

In the matter between:

TRANSWIDE FREIGHT CC **PLAINTIFF**

and

OTJIWARONGO TAXIDERMY **DEFENDANT**

CORAM: Frank, A.J.

Heard on: 2008.05.19, 21, 22 and 23

Delivered on: 2008.05.23 *(Ex Tempore)*

JUDGMENT

FRANK, A.J.: [1] Plaintiff is a shipping and forwarding agent. Defendant is a taxidermist. Defendant receives trophies and skins from individual hunters and hunting farms to process. These trophies and skins hereinafter collectively referred to as (trophies) are forwarded to the individual hunters who requested that it be processed. Where hunting farms forwarded these to defendant it also gave defendant the names and addresses of the

individual hunters involved. Where the individual hunters reside abroad the finished trophies are forwarded to them. Needless to say this involves the obtaining of the necessary documentation such as customs clearance, export and veterinary permits to facilitate the forwarding of the trophies across the border of Namibia. It is in this regard that use was made of plaintiff by defendant.

[2] Prior to the incident which led to the present action being instituted it is common cause that a continuous course of dealing developed between the parties over a period of about 5 years as follows as far as shipment by sea was concerned. Whenever defendant had sufficient trophies ready plaintiff was contacted to check the availability of vessels and to arrange for a container to be forwarded to defendant. Defendant would pack the container and return the container to Walvis Bay together with certain documentation including a packing list. Plaintiff, who in the meantime would have arranged for the necessary documents for the export would then see to it that the container was loaded on a vessel. The consignee was a concern in Denmark known as Airland International. Airland was provided with a list of all the individuals to whom trophies were to be delivered and would contact these persons and recover the transport costs from them (not necessarily pro rata). Airland would then reimburse plaintiff for these transport costs which it normally incurred upfront. All the costs and fees incurred by plaintiff leading up to the transport

in obtaining the necessary documentation and permits the defendant paid to it. Airland took out or was suppose to take out insurance in respect of the cargo in transit while on the vessel.

[3] During September 2005 a container was loaded on a vessel pursuant to the usual procedure outlined above. This vessel sunk and it transpired that Airland had omitted to insure the cargo which was a complete lost. The question then arose for the first time as to who was responsible in these circumstances for the freight charges and the plaintiff's agency charges incidental thereto. Correspondence in the form of e-mails were exchanged by the parties, Airland and apparently even with the persons who awaited the delivery of their trophies. In this process plaintiff paid the freight charges to gain possession of the bill of lading and in this matter sues defendant for the outstanding amount of N$46 845.38 in respect of it's expenses and services. Defendant opposes this claim principally on the basis that plaintiff was not it's agent in respect of the matter for which it claims.

[4] The above summary is based on the evidence presented at the hearing and as already stated is common cause. This evidence does not in all respects tie up with the allegations in the Particulars of Claim and the Plea but as this was common cause before me I can see no injustice if it deal with the matter or this basis instead of comparing it with magnifying glass to the pleadings and to

attempt to discredit the parties (or one of them) for deviation from the pleadings.

[5] The witnesses for both parties, both in their correspondence and in their evidence used the word "agent" very loosely and not in it's legal technical sense and one must be careful to analyse their relationship(s) with the party or parties referred to as "agent(s)" to ascertain whether such party(ies) was (were) indeed an agent of either of them. The witness for the plaintiff stated that when plaintiff commenced to do business with defendant he was informed that the insurance was dealt with by Airland. He states that he had to pay the freight upfront and recover this from Airland as this was the way bills of lading were structured. This was not the normal way matters such as the present was dealt with but was in fact a fait accompli he had to accept if he wanted to do business with defendant. As far as he was concerned as defendant as shippers were also liable in terms of the bill of lading for the cost of the freight to the shipping line he regarded plaintiff as their agent and was of the view that as Airland did not reimburse him and indeed had refused to accept liability they (defendant) had to pay him. This according to him also followed from the fact that he was their shipping agent and entrusted with getting the container on board the vessel and ready for transport. According to him he was told that Airland would see to the insurance and it thus also follows that Airland was the agent of defendant.

[6] Because of the specific arrangement between the parties and Airland the crux of the matter is to determine who was ultimately responsible for the transport costs. Here it must born in mind that this must not be confused with the question as to who is liable to the shipping line for these costs as in terms of the bill of lading and it's wide definition of "merchant". The shipping line was at liberty to choose either of the parties or Airland (who appears as the consignee on bills of lading). The question is, as between the parties, Airland and possibly even the ultimate owners who was responsible for the payment of the freight?

[7] Plaintiff's witness conceded that during the course of plaintiff's relationship with defendant invoices for the freight and incidental services were never rendered to defendant but only to Airland who on previous occasions always reimbursed it. It should be noted here that the invoice on which plaintiff sues was also initially only forwarded to Airland. As already mentioned Airland recovered the costs from the ultimate consignees. In the correspondence the evidence and indeed the pleadings both parties on occasion referred to Airland as their agent or receiving agent and this is not helpful when attempting to decide the issue at hand. It is however important to note the evidence of this witness that defendant was always indicated as the "shipper" on the bills of lading and hence was responsible to the shipping line for their

costs of conveying the goods. Defendant's witness accepted that it's reflection as "shipper" was correct.

[8] Defendant's witness stated that in her view Airland or the ultimate owners were responsible for the transport costs. This was so because their "booking" agent in Denmark had suggested Airland and if persons asked them for taxidermy work to be sent abroad they would say they can recommend Airland but if such customers wanted to use someone else they would use such other person. They charged for all their work and costs up to the harbour in Walvis Bay and thereafter the clients would be responsible for the costs of transport. Defendant thus paid plaintiff for all the preparatory work and documentation up to the point where the goods were ready for conveyance. On all the previous deals this was how it was done and defendant was only invoiced for this by plaintiff. On no occasion was an invoice for the transportation costs forwarded to defendant or even copied to defendant. These were always rendered to Airland who collected this from the ultimate consignee's. She conceded that she referred to Airland as defendant's agent but did this in the context mentioned and as a "receiving" agent on behalf of the defendant's clients. She also forwarded requests and/or instructions to Airland in respect of matters concerning individuals who were awaiting trophies. These communications however were always circulated to plaintiff so as to keep it abreast of these matters.

[9] No witness connected to Airland was called to explain their position and on what basis they rejected liability seeing their failure to insure the cargo.

[10] Plaintiff's witness referred to above was a Mr Moodley. Plaintiff indeed called a second witness in respect of replacement permits for the trophies involved as a result of a dispute as to whether any of the original cargo was salvaged. On the evidence of defendant's witness nothing was salvaged. In my view nothing turns on this aspect and in view of the common ground as to how the relationship between the parties worked there is no need to assess this aspect to determine whether and which manner this may impact on the veracity of the conflicting versions on the pleadings and does not assist to determine whether plaintiff was the defendant's agent for the purpose of it's claim.

[11] The plaintiff has the onus to establish on a balance of probabilities that in respect of the transportation costs of the shipping line it was the defendant's agent. In my view it did not discharge this onus. The fact is that defendant never paid for this before, that defendant was never invoiced for this and that the invoice to Airland was not even copied to it. Defendant made no payments whatsoever to Airland. Payment to Airland was made by the ultimate customers. As mentioned Airland reimbursed plaintiff for such transportation costs incurred by it. On the evidence I cannot state on a balance of probability

what the position of Airland was. The fact that it was not paid by defendant at all militates against being it's agent. It may have been a "receiving" agent as alleged in that it collected the cargo on behalf of the ultimate customers in which case it was not an agent of either of the parties. Lastly on a proper construction it may even be the principal of plaintiff in that plaintiff pays upfront on it's behalf on the basis it is to be reimbursed by Airland. I can't discount the possibility that Airland was the agent of defendant for the reasons advanced by plaintiff witness mentioned above but I cannot say this is so on a balance of probabilities. The probabilities are to evenly spread to come to a conclusion.

[12] The same remarks about the balance of probabilities can be made in respect of plaintiff's claim that it acted as defendant's agent when it incurred the expenses it claimed from defendant. Once again it cannot discount this as a possibility but when it comes to a balance of probabilities I cannot find that the scale has tipped in favour of plaintiff rather than defendant when all the facts are considered.

[13] In the result the order I make is one of absolution from the instance.

[14] From a costs perspective an order for absolution is usually regarded as a success for the defendant and the defendant is thus usually granted a costs

order. Defendant's representative referred me to authority and case law in this regard and submitted that I should follow this approach. Whereas I appreciate that this is the usual approach the Court has a discretion, should the circumstances justify it, to deviate from this approach and make an order it deems just in a particular instance.

[15] In this matter the parties had a cosy business arrangement over a number of years which caused them no trouble and which I can only assume was mutually beneficial otherwise it would not have endured. An important cog in these operations was Airland who is the root cause of the current dispute and who finds itself outside the jurisdiction of this Court. The amount involved is of such a nature that reasonable persons would not have litigated over it. This must be viewed in light of the prior relationship and dealings between the parties. I must also mention the fact that plaintiff was compelled to pay the freight costs persuant to the provisions of the bill of lading and could obviously as shipping agent not jeopardise its position with a shipping line and then received no sympathy from either the defendant (who knew it was Airland's duty to insure) or Airland (who is situate outside this Court's jurisdiction).

[16] Because of the reasons aforementioned I am of the view that it will be fair and equitable in the present matter if each party pays it's own costs and hence there is no need to make a costs order.

[16] In the result I make the following order:

1. I make an order of absolution from the instance.

2. I make no order as to costs.

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FRANK, A.J.

ON BEHALF OF PLAINTIFF	**Adv N Bassingthwaight**
Instructed by:	**H D Bossau & Company**
ON BEHALF OF DEFENDANT	**Mr C Brandt**
Instructed by:	**Chris Brandt Attorneys**