FORM A
FILING SHEET FOR EASTERN CAPE JUDGMENT

ECJ no : 133

PARTIES:

ATOMIC TRANSPORT CC t/a FREIGHT **PLAINTIFF**

and

TRANSNET LIMITED **DEFENDANT**

REFERENCE NUMBERS -

- Registrar: **3815/04**
- Magistrate:
- High Court: **South Eastern Cape Local Division**

HEARD: **22 & 23 May 2006**

DATE DELIVERED: **8 June 2006**

JUDGE(S): **Dambuza J**

LEGAL REPRESENTATIVES -
Appearances

- for the State/Applicant(s)/Appellant(s): **Adv Beyleveld**
- for the accused/respondent(s): **Adv Ramaepadi**

Instructing attorneys:

- Applicant(s)/Appellant(s): **Friedman Scheckter**
- Respondent(s): **Boqwana Loon & Connellan**

CASE INFORMATION –

- *Nature of proceedings*: **Civil case**
- *Topic*:
- Keywords:

IN THE HIGH COURT OF SOUTH AFRICA
(SOUTH EASTERN CAPE LOCAL DIVISION)

CASE NO: 3815/04

In the matter between:

ATOMIC TRANSPORT CC t/a FREIGHT **PLAINTIFF**

and

TRANSNET LIMITED **DEFENDANT**

JUDGMENT

DAMBUZA J:

1. In this case plaintiff claims an amount of **R454 369.80** from the defendant for services rendered by plaintiff for or on defendant's behalf. Defendant denies that it is liable for the amount claimed and pleads that there is no agreement between it and plaintiff in respect of the services rendered by the latter. At this stage the issue before me is whether there was an agreement between the parties that defendant would pass to plaintiff certain work from defendant's clients that it (defendant) could not handle and whether, in particular, defendant instructed plaintiff to do work as specified in plaintiff's declaration.

2. The amount claimed by plaintiff is in respect of services rendered by plaintiff for certain shipping agents, including **Ocean Africa Container Lines** *(Ocean Africa),* **Gentainer** and **COLAS**. In its plea, defendant alleges that its representative **Gerber**, merely referred **Selven Marimothoo** of **Ocean Africa**, to **Charles Henry Parsons**, a

representative of plaintiff in respect of work from **Ocean Africa** which defendant could not handle.

3. Plaintiff is a close corporation engaged in the business of moving, transporting and supplying power to containers in the Port Elizabeth Harbour. Defendant, is also engaged in the business of transporting and/or moving containers at various Ports within South Africa, mainly through its subsidiary, **Spoornet**.

4. **Charles Henry Parsons** (Parsons) is plaintiff's sole member and the only witness who testified on plaintiff's behalf. His evidence was that on about June or July 2004 an agreement was concluded by and between the parties at a meeting attended by **Parsons** and **Gordon Sawyer,** plaintiff's operations manager together with defendant's representatives **Kobus Gerber** *(Gerber),* who was then defendant's operations' manager, **Conway van der Kuil** *(Van der Kuil*) who worked with **Gerber** and **Gift Khaba** *(Khaba),* defendant's financial manager. At this meeting it was agreed that plaintiff would pass on to plaintiff work from its clients relating to transportation of containers and providing of plug-in power supply points for heating or cooling of container contents. Defendant would be liable for payment in respect for such services. A tariff in terms of which plaintiff would charge defendant for such services was agreed upon.

5. In practice plaintiff would receive either a telephone call or a **Container Terminal Order** *(CTO)* from one of defendant's representatives with instructions and particulars regarding work that plaintiff had to do. A CTO is a document which sets out, amongst others, particulars of the Importer or Shipping Agent, the Consignee, Order Number, Reference Number, the Container Operator, the collection date, container Number, Description of Container Contents and the party liable for freight charges. Such instructions were usually brought by either **Gerber, Van der Kuil** or one of defendant's messengers. Plaintiff would then perform the task and on completion,

issue an invoice to defendant. Between July and October 2004 plaintiff did work for defendant in terms of the agreement on a daily basis. Defendant's representatives would deliver CTO's to plaintiff for work that plaintiff had to do and at the same time collect invoices in respect of work that plaintiff had already done. Payment would be due 30 days from the date of the invoice.

6. According to **Parsons** at some stage there were instances of miscommunication of instructions between one of defendant's clients, **COLAS,** defendant's representatives and plaintiff's representatives. This resulted in delays in the execution of **COLAS'** instructions. To avoid such delays, **Parsons** instructed **COLAS'** staff to communicate with him directly regarding work that had to be done for **COLAS**. A practice developed in terms of which **COLAS'** representatives communicated directly with plaintiff by e-mail regarding work that was to be done for **COLAS.** Copies of such e-mails would then be forwarded to **Gerber** and **Van der Kuil**.

7. Plaintiff did not receive any payment for services that is rendered for defendant from July to October 2004. According to **Parsons** he discussed the problem of non-payment with defendant's representatives including **Gerber** and **Khaba**. At some stage **Khaba** suggested that **Parsons** complete a certain form so that plaintiff's name would be placed on defendant's Vendor's Roll. This however yielded no positive results. **Parsons** continued to phone **Khaba** about the problem.

8. At some stage **Khaba** called **Parsons** to a meeting at which representatives from a number of defendant's clients, including **Ocean Africa, Kings and Sons** and **BP** were present. At that meeting a representative from **Ocean Africa** expressed dissatisfaction about invoices that her company had received from plaintiff. She complained particularly about the rates at which her company was charged and charges for items such as power supply.

9. It was resolved that plaintiff would present its invoices directly to **Ocean Africa** for payment. This entailed that all debits passed by plaintiff against defendant would be reversed and such debits would be passed against the account of **Ocean Africa**. This arrangement did not succeed as **Ocean Africa** refused to pay according to the rates agreed on between plaintiff and defendant. Plaintiff then reverted to defendant for payment and when the latter refused to pay, these proceedings were instituted.

10. **Gift Khaba** who testified on defendant's behalf denied that he was present at the meeting at which the alleged agreement was concluded. He testified that as defendant's finance manager he was responsible for ensuring that entities which provided services to defendant were enrolled on defendant's vendor list. In this way he knew all entities which rendered services for or on defendant's behalf. As plaintiff was not on the list, it was not entitled to do work for defendant.

11. According to **Khaba,** he first became aware of the problem relating to plaintiff's payment when **Parsons** told him about the problem on the pone. **Khaba** then arranged for **Parsons** to be present at the meeting where representatives of defendant's clients were present for discussions on accounts they (the clients) had received from defendant. At that meeting it was agreed that plaintiff would look to **Ocean Africa** for payment in respect of work done for **Ocean Africa.** Regarding services rendered by plaintiff for other agents **Khaba** maintained that defendant was not liable therefore.

12. At the hearing it was common cause that the onus was on plaintiff to prove that the agreement existed between itself and defendant. **Mr Beyleveld** who appeared on plaintiff's behalf submitted that plaintiff had succeeded in proving the existence of the agreement. I am in agreement with this submission. The evidence of **Parsons** is consistent with documentary evidence which forms part of the record.

In my view **Parsons** was a credible witness. I am satisfied that he testified clearly and honestly and that the probabilities favour his version rather than the version presented by **Khaba.**

13. **Khaba** did not deny that CTO's were delivered to plaintiff by defendant's representatives and that plaintiff rendered services in terms of such written instructions. He also did not deny that plaintiff rendered services on oral instructions issued by defendant's representatives. In my view, these instructions are an indication of a preceding agreement between the parties and when accepted by plaintiff, amount to agreements in respect of the particular tasks to be performed.

14. In a particular instance, defendant (through Spoornet), acknowledged in a delivery note dated 23 September 2004 addressed to **Ocean Africa** that it had received instructions to transport six specified containers for **Ocean Africa**. These were containers **TRLU 187909, TRLU 830437, JXLU 5963852, JXLU 5964714, JXLU 5964885** and **JXLU 5965222.** The containers were proved in evidence to have been transported by plaintiff on the 23 September 2004 and on the same order numbers that appear on defendant's delivery note. On the CTO's from which plaintiff obtained instructions to transport (or "move") the containers, defendant is cited as the party to be charged for transportation of the containers. In my view, the fact that the defendant received instructions to render a service and such service was proved to have been rendered by plaintiff supports **Parsons'** evidence regarding the agreement between the parties. **Khaba** could give no plausible explanation as to how, in the circumstances plaintiff could move the containers other than on defendant's instructions.

15. It was submitted on defendant's behalf that e-mails with instructions for work to be done for **COLAS** which were sent by **COLAS** directly to plaintiff were proof that the agreement for such work to be performed was concluded between plaintiff and **COLAS**. I do not agree with this

submission. The e-mails have to be considered in the context of the totality o the evidence. **Parsons'** evidence on why **COLAS** communicated directly with plaintiff is supported by the contents of the e-mails. I am satisfied that the fact that copies of the e-mails were sent to defendant's representatives is proof that defendant as the main contractor, had to have a record of the work done by plaintiff for defendant's clients. This would facilitate efficiency and reduce communication problems which had developed as **Parsons** testified.

16. It is evident that throughout the period under consideration when plaintiff completed specific tasks, it issued invoices to defendant in respect of the work done. Defendant in turn sent invoices to its various clients. The clients, on receiving the accounts, noted certain items thereon which were not in accordance with their agreement with defendant. In my view the only reason that the clients (shipping agents) complained to defendant regarding such charges was because the agreement regarding work to be done was between them and defendant. Further, from the nature of the complaints I can only conclude that the invoices issued by defendant to its clients were based on the invoices that defendant had received from plaintiff; for example the charges for power supply. This accords with **Parsons'** evidence that defendant's representatives received invoices from plaintiff on a daily basis.

17. I am also satisfied that the reverse entries passed by plaintiff on defendant's accounts were merely made in an attempt to resolve the problem matter. Defendant, however remained the party that had instructed to do work and remained the party liable to plaintiff in respect of work done for **Ocean Africa** as well as the other agents as set out in plaintiff's declaration.

18. The fact that plaintiff was not on defendant's Vendor List is not of material significance to the agreement between the parties.

In the result, the following order shall issue:

(a) An agreement was concluded between plaintiff and defendant in the terms set out in paragraph 3 of plaintiff's declaration;

(b) In terms of the agreement defendant furnished plaintiff with instructions as set out in paragraph 4.1.1 of plaintiff's declaration;

(c) Defendant shall pay the costs of the separated hearing.

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N DAMBUZA

JUDGE OF THE HIGH COURT 6 June 2006