IN THE COURT OF APPEAL OF LESOTHO

C OF A (CIV) NO 15/2012

In the matter between:

INFRADEV LOGISTICS **APPELLANT**

and

THABO KOU TRANSPORT **RESPONDENT**

CORAM: MELUNSKY JA
SCOTT JA
TEELE AJA

HEARD: 10 OCTOBER, 2012
DELIVERED: 19 OCTOBER, 2012

SUMMARY

Parties agreeing that respondent as subcontractor would perform services pending agreement as to remuneration to be paid – no agreement reached – tacit term that respondent be paid at fair and reasonable market rate – that rate on the evidence coinciding with the rate at which the appellant itself was being paid – appeal dismissed with costs.

[1] This is an appeal against the decision by Hlajoane J who granted judgment in favour of the respondent against the appellant for payment of the sum of M1.237 600 for carrier services rendered by the former for the latter during the period April 2009 to September 2009.

[2] The essential facts are relatively straight forward. Safmarine is a shipping company that carries containers both by sea and land, presumably in terms of multimodel bills of lading. (As to which, see: **Loomcraft Fabrics CC v Nedbank Ltd** 1996 (1) SA 812 (A) at 818 G-J.) It is common cause that the appellant entered into a contract with Safmarine for the carriage of containers on the last leg of their voyage, which was from the container depot in Maseru to their ultimate destinations in Lesotho. The appellant has, itself, no facilities to render that service; it is dependent on a subcontractor to do so. It accordingly, represented by Mr. Harry Mashele, entered into negotiations with the respondent, represented by Mr. Thabo Kou, for the latter as subcontractor to provide the necessary carrier service. The parties were, however, unable to agree on the rates at which the appellant would be charged per container. Nonetheless, it was agreed

that the respondent would proceed to provide the service pending the parties reaching an agreement. Discussions were held on several occasions but no agreement was reached. In the meantime, the respondent proceeded to provide the service. After six months agreement had still not been reached and the respondent had received no payment. It accordingly ceased work and ascertained from Safmarine the rates at which it was paying the appellant. (The rates varied depending on the size of the container and the distance it had to be conveyed.) It then invoiced the appellant for its services at those rates which it contended were fair and reasonable and market rates. The appellant refused to pay on the grounds that there was no agreement as to the rates payable and that the rates claimed by the respondent would result in it making no profit on the transaction.

[3] It is clear that this is not simply a case of a party rendering a service for another without a mandate and merely in the hope of receiving a reward for the service so rendered. The respondent in the present case proceeded to perform a service as a carrier on the basis that it would be paid for that service and the appellant acquiesced in it doing so. Indeed, the evidence goes further and indicates that it was specifically

agreed between the appellant and the respondent that the latter would go ahead and provide the service for which it would be paid. Moreover, the appellant not only accepted the benefit of that service, it was contractually bound to Safmarine for the performance of that service. Quite clearly it was not, nor could it have been, contemplated by the parties that the respondent would be paid nothing at all. It follows that while the parties failed to conclude the contract initially contemplated, namely that the respondent would be paid for its services at a specified rate, what was agreed was that the respondent would immediately proceed to render the service and would be paid for doing so. Applying the so-called Reigate test (**Reigate v The Union Manufacturing Co** (1918) 1KB 592 at 605) as to what the parties would in the circumstances have said had they been asked what would happen in the event of them not reaching agreement as to the rates at which the respondent would be paid, there can be no doubt, in my view, that they would both have said that in such an event the respondent would be paid at the fair and reasonable market rates. Their agreement that the respondent proceed with the work in the meantime and would be paid for its services must accordingly be construed as including such a tacit term to give it "efficacy in the

business sense." See **Mullin (Pty) Ltd v Benade Ltd** 1952 (1) SA 211 (A) at 215 A. The parties would most certainly not, in answer to the question posed above, have said that in the event postulated the respondent would be paid nothing.

[4] The respondent did not, however, plead that the amount claimed was calculated on the basis of what would be fair and reasonable market rates. But the issue of what would constitute such rates was widely canvassed in evidence without objection and appears to have been the principal issue between the parties in the Court *a quo*. The failure on the part of the respondent to properly plead the basis on which its claim was calculated could not in the circumstances have resulted in prejudice to the appellant. (**Cf Shill v Milner** 1937 AD at 105.)

[5] Safmarine is a large shipping line. There is nothing to suggest that the rates at which it was prepared to pay for the carriage of containers were anything other than competitive and market related. As previously indicated, the appellant's objection to the use of these rates for the purpose of determining the amount to which the respondent

was entitled was that it would result in the appellant being deprived of the opportunity of making a profit as the middleman. Accordingly, so it was contended, the appellant would not have agreed to the respondent being remunerated at the Safmarine rates. But the inquiry as to what are fair and reasonable rates is an objective one and the fact that the appellant sought to pay the respondent at rates less than the Safmarine rates is irrelevant for the purpose of determining what would be fair and reasonable market rates. As indicated above, Safmarine is a large shipping line. Its bargaining strength is obvious. It is highly unlikely that it would pay for carrier services at rates higher than market rates. In the circumstances, I can find no fault with the decision of the Court *a quo* to award the respondent an amount calculated at the Safmarine rates. It is true that in the result the appellant will make no profit on the transaction. But for this it has only itself to blame. It was quite prepared to sit back and allow the respondent to provide the carrier service for a period of no less than six months without agreeing upon a rate. It adduced no evidence to indicate a market rate less than the Safmarine rates, nor did it make a tender of payment for the services rendered by the respondent.

[6] The appeal is accordingly dismissed with costs.

_____
D.G. SCOTT
JUSTICE OF APPEAL

I agree:

_____
L.S. MELUNSKY
JUSTICE OF APPEAL

I agree:

_____
M.E. TEELE
Acting JUSTICE OF APPEAL

For the Appellant : Adv. T.S. Tsemase

For the Respondent: Mr. T. Matooane