IN THE KWAZULU-NATAL HIGH COURT, DURBAN
REPUBLIC OF SOUTH AFRICA

CASE NO: 4435/2015

In the matter between:

BRUNEL LOGISTICS SOUTHERN AFRICA (PTY) LTD Plaintiff

and

OS TRADING Defendant

Order:

1. Judgment is granted in favour of the Plaintiff in the main action in sum of R463 099,89;
2. Interest on the aforesaid amount at the rate of 9% per annum, from date of summons to date of final payment;
3. Cost of suit.
4. The Defendant's counterclaim is dismissed, with costs.

JUDGMENT

CHETTY J

[1] The plaintiff instituted action against the defendant based on three claims arising from the clearing and forwarding of used telecommunications equipment from Nigeria and Zimbabwe to Durban, South Africa. The equipment, at the request of the defendant, was transported to Durban and thereafter delivered

via road freight to the premises of SIMS Recycling Solutions Africa (Pty) Ltd ('Sims'), a client of the defendant. Despite the plaintiff delivering the goods to their final destination, despite demand the defendant has refused to pay the amount of the three claims, totalling R532 944,20 for services rendered. The plaintiff instituted action to recover the amount, while the defendant not only defended the action but instituted a counter claim on the basis that the plaintiff breached a 'non-circumvention' agreement, as a result of which the defendant sustained loss of business totalling R1 626 445,80. The counter claim was resisted by the plaintiff.

[2] When the matter came before me the defendant applied for a postponement of the trail. After hearing argument from both counsel, I refused the application, with costs.

[3] The plaintiff then gave notice of its intention to amend its summons, with the deletion of the second claim pertaining to the clearing and forwarding of a consignment from Mauritius. That amendment was duly granted. As a consequence, the plaintiff's claim was crystallised into 2 distinct claims, all of which were set out in a 'Master Schedule', totalling R463 244,89. This amount was subsequently rectified to R463 099.89. made up as follows :

[3.A] The first claim was in respect of the transportation and forwarding of goods from Nigeria to Durban at the instance and request of the defendant.

[3.B] The second claim (comprising two parts) is for the transportation of used telecommunications equipment from Zimbabwe to Durban and thereafter for the onward transportation via road freight to Balito, to the premises of SIMS Recycling Solutions Africa Pty Ltd, a client of the defendant.

[4] It is common cause that the plaintiff performed in terms of the agreement with the defendant and submitted invoices of the claims as per the Master Schedule. The defendant refused to pay the amounts thereby giving rise to the present action. The defence pleaded is simply that the plaintiff is put to the proof that the invoiced amounts (as per summons), were correctly calculated. When the

parties convened a pre-trial, the plaintiff directed the following enquiry to the defendant :

> "In as much as defendant admits that the services were rendered by the plaintiff, what does defendant allege was the price that the plaintiff would have been entitled to charge, but for the defences raised by defendant?

The defendant provided the following response:

> "The defendant *admits* that the plaintiff was entitled to charge the rates claimed but for the defences raised by the defendant".

[5] At the commencement of the trial, counsel for the plaintiff submitted that in light of the defence as pleaded by the defendant, all that was necessary for the plaintiff to succeed in the main claim was to prove that the invoices rendered to the defendant were correctly calculated. Mr Boulle, who appeared for the plaintiff, went a step further and submitted that to that end, once the respective invoices are proved, the defendant loses the right to cross-examine the plaintiff's witnesses. I was not in agreement with this contention and considered it to be an overly robust approach. I do agree however that the pleading limits the defendant to contesting only the accuracy of invoice. There is no dispute on the pleadings that the plaintiff rendered services, and that the defendant had no complaint as to the competency or efficiency thereof. It must also be assumed that the goods were properly conveyed and received by the client of the defendant, SIMS Recycling. It has also not been disputed by the defendant that it was duly paid by SIMS in respect of the goods delivered. This accordingly begs the question raised by counsel for the plaintiff at the outset of the trial as to what exactly remains in dispute between the parties?. The total amount of both claims due by the defendant is R476 515,49, as reflected in the Master Schedule, and later corrected to reflect R436, 099, 89, which is common cause between the parties.

[6] It is pertinent to point out that prior to the commencement of trial I requested the parties to clearly define the issues for determination. The parties concluded a written agreement as to the issues in dispute. These are the following –

[6.1] the plaintiff is put to the proof that the amounts set out in its invoices were correctly calculated, with the total due being the amount of R463, 099, 89.

[6.2] the defendant disputed the charges for standing time, but no further details were available in this regard.

In essence, those are the matters concerning the claim in convention.

[7] The plaintiff called one witness in support of the proof of its claim, Vinesh Parmeshwar, a freight controller employed by it with personal knowledge of the agreement and transactions concluded for and on behalf of the defendant. In respect of the plaintiff's business relationship with the defendant, he testified that this comprised doing sea and road freight logistics, including shipments from Nigeria. Parmeshwar testified in detail in relation to the first claim and the invoice submitted to the defendant for payment, which appeared at page 74A of the bundle of exhibits. This invoice pertained to a consignment of goods from Nigeria, comprising two 40 foot containers, as specified on the invoice. Whilst the estimate in respect of the particular transaction was issued in December 2014 and the prices estimated at the time were based on the Rand/Dollar rate of exchange of R11.40, at the time of invoicing the defendant the rate of exchange had increased to R11.70. The amount for the "pre carriage pickup charges", being a reference to the containers, was estimated to be R61 560. This amount was subsequently reduced on the invoice to R42 120, for two containers. Similarly, the export charge in the invoice was an amount of R46 332 as opposed to the estimate of R67 760.

[8] Parmeshwar went on to explain that the bill of lading amounted to R7 020, being a reduction from R10 260 from the initial estimate. The invoice included charges for forklift security and a shipping line fee, being a disbursement paid to the shipping company, Pacific International Liner Agency, which amounted to R 6 838.

[9] In addition, the plaintiff charged the defendant import cargo charges payable to Transnet Ltd in respect of the containers brought into South Africa. This amounted to R7 905, 28. Similarly, the plaintiff incurred the costs in relation to the transport of the containers from the Durban Container Depot to SIMS

Recycling in Balito, amounting to R3 300 per container, together with a mark-up of R400. Parmeshwar pointed out that the plaintiff did not charge the defendant for any standing time. It billed the defendant an amount of R435, being a container terminal order fee, payable by all clearing and forwarding companies. This amount, according to him, should be reduced to R290, as the transaction only applied two containers. An agency fee was paid, amounting to R2 058, 96 as well as a facility fee of R150 and a documentation fee being a flat charge of R350. The total amount of the invoice according to the witness was R174 547, 73.

[10] Prior to the plaintiff leading its witness any further in respect of claims 3A and 3B, Mr Havemann, who appeared on behalf of the defendant, indicated that the defendant only took issue with the demand of standing time contained invoices. The claim in 3A for standing time is R52 500. In respect of Claim B, the standing time for three trucks is R99 000. The remaining items contained in the Master Schedule are not in dispute.

[11] What is apparent from the outset, in my view, is that the defendant has pleaded a general defence on its papers, putting the plaintiff to the proof of its claim. At trial, this defence was whittled down to the issue of standing time. If this was the defendant's original compliant with the invoice, one wonders why these matters were not raised on the pleadings.

[12] In light of the approach adopted by the defendant, the remainder of Parmeshwar's evidence focused on the charges for standing time incurred in respect of the road freight of goods brought in from Zimbabwe to Durban. The procedure, he explained, is that at the Customs' point of entry, each truck is required to have a document referred to as a 'CV1'. The problem which gave rise to claim 3A relating to the collection of goods from Barclays in Harare, is that the defendant only supplied one CV1 document, whereas the consignment comprised 2 containers. In order to overcome the problem, the two trucks had to travel as a convoy. No fee is levied for the first 48 hours standing time. Parmeshwar referred to an email of 25 February 2015 from Troy Botha to Tamryn Osborne, acting for the defendant, in which Botha informed Osborne

that the trucks incurred standing time of 11 and 10 days respectively, at a charge of R4 500 per truck. Botha further advised Ms Osborne that the costs in respect of standing time had been negotiated down to 8 and 7 days respectively, at the rate of R3 500 per day, equating to a total of R52 500. The initial amount for standing time was R94 500. Botha further requested confirmation of the acceptance of the charges.

[13] In response, Ms Osborne addressed an email on 26 February 2015 stating that she accepted Botha's proposal but needed to discuss the matter with her client, after which she would revert to him. On 27 February 2015 Botha again wrote to Ms Osborne regarding confirmation of the standing charges, to which Ms Osborne responded that charges were "*unwillingly"* accepted. The email gave no hint that the defendant was dissatisfied with the charge or the rate. Parmeshwar testified that while the amount of R52 500 is reflected as standing time, the plaintiff discounted a further amount of R2 500 for local standing time, following negotiations it had with the defendant. The passing of the credit note for this amount is reflected in the calculations on the Master Schedule. That concluded the plaintiff's evidence on Claim 3A.

[14] In relation to claim 3B, Parmeshwar stated that this related to a consignment comprising four truck-loads of goods from Zimbabwe to Durban. The convoy comprised one truck loaded with a container and the remaining three with a "bulk break", meaning a truck where a tarpaulin is used to cover the goods. The witness testified that in total, the trucks stood at the border post for 11 days, the reason being that similar to claim 3A for standing time where the defendant provided only one CV1 for use at Customs. As such, all the trucks had to wait at the border in order to be cleared together. Only once this process was complete, could the trucks continue on their journey.

[15] During the course of the trip from Zimbabwe to Durban Ms Osborne had been informed by email on a regular basis of the position concerning standing time, as the tracking system allowed for regular updates on the movement of the trucks. On 25 March 2015 Parmeshwar sent an email to Ms Osborne in which he indicated that there was a total of 9 days incurred as standing time, a

reduction from the original amount of 11 days. According to the email, after representations were made by the plaintiff to the haulier company, the amount of standing time was reduced to 6 days, at a rate of R5 500 per day. As there were 3 vehicles delayed up at the border post, the total for all the vehicles was R99 000. Ms Osborne responded that the defendant was not in agreement with this assessment and requested a detailed breakdown of the tracking and standing time in order for her to assess the situation.

[16] The plaintiff thereafter engaged the haulier company to obtain a further reduction of standing time and obtained a credit of R46 500, which it reflected on its invoice to the defendant. As a result, the amount for which the defendant was credited equated to R49, 313, 50. The total due in respect of the invoice for Claim 3B was R182, 100. This constituted the plaintiff's evidence on Claim 3B.

[17] In total, the amount of the three invoices totalled R463 099, 89, which according to the witness is still outstanding and payable by the defendant.

[18] Prior to Mr *Havemann* proceeding with his cross examination, a lengthy debate ensued on what exactly the ambit of the defendant's cross examination would entail as the plaintiff contended that the defendant was bound by the defences as pleaded, together with the responses in terms of the Rule 37. To this end, Mr *Boulle* contended that while the defendant could cross-examine the witness of the factual position regarding standing time, it was not within the defendant's remit to challenge the rates charged by the haulier company to the plaintiff as these rates were specifically admitted by the defendant as part of its responses under Rule 37. Counsel contended that he led his witness based on what was pleaded by the defendant.

[19] Innes CJ in *Robinson v Randfontein Estates GM Co Ltd* 1925 AD 173 pointed out that parties should be kept strictly to their pleadings. He added further at 198

> "The object of pleading is to define the issues; and parties will be kept strictly to their pleas where any departure would cause prejudice or would prevent full

> enquiry. But within those limits the Court has a wide discretion. For pleadings are made for the Court, not the Court for pleadings."

This view was endorsed by De Villiers JA in *Shill v Milner* 1937 AD 101. The role of pleadings, as set out *Beck's Theory and Principles on Pleadings and Civil Actions* 6th ed (2002), p43, is that they must ensure that both parties know what the points of issue are between them, so that each party knows what case he has to meet. He or she can thus prepare for trial knowing what evidence he or she requires to support his own case and to meet that of his opponent. The object of pleading is to clarify the issues between the parties and a pleader cannot be allowed to direct the attention of the other party to one issue, and then at the trial attempt to canvass another. *Kali v Incorporated General Insurances Ltd* 1976 (2) SA 179 (D) at 182A.

I was of the view that the defendant was intent on constantly changing the goal posts and building on to its defence as the trial proceeded. This type of litigation – trial by ambush, in my opinion – has been correctly frowned upon by our courts. It significantly prejudices the other litigant. Mr *Havemann*, as I understood his contention, stated that the defendant wished to amend his defence to deny liability for standing time on the basis that this is a charge to be borne or absorbed by the plaintiff, and not an expense that can be passed onto the defendant as there was no contract in place between the haulier and the defendant. The argument raised by Mr *Havemann* that standing time was not raised by the plaintiff prior to the consignment being transported is undermined by an exchange of correspondence between Parmeshwar and Ms Osborne as at 2 February 2015, in which she is informed that standing time is charged at the rate of R3 500 per day, after the first 48 hours. There can be no complaint from the defendant that this was a charge that would be absorbed by the plaintiff. It was made abundantly clear to the defendant that standing time would be for its account. In any event, as I understood the plaintiff's witness, where standing time cannot be attributed to a fault on the part of the customer, this would be absorbed by the haulier. After hearing argument on the matter I ruled that the cross-examination of the witness would be confined to those defences set out in the plea and amplified in the Rule 37 admissions.

[20] Under cross-examination Parmeshwar was unshaken and maintained throughout that the rates for standing time had been agreed to with Ms Osborne, and that the delays incurred at the border were due to the defendant having only one CV1 document, even though the trucks were travelling in convoy. He denied that the plaintiff was responsible for the correctness of all paperwork and documentation in respect of goods brought into the country and maintained that only the client would know the true contents of a container being transported. As a result, if the container is opened by customs officials and is found to contain goods different from that reflected in the CV1 form, the customer will be liable for the additional charges levied. He further stressed that the plaintiff in these scenarios never acts as an importer, but strictly as an agent on behalf of the customer. Parmeshwar further clarified that a customer would not be liable for standing time where the reason for the delay could be attributed to the haulier, for instance, where one of the trucks suffered a mechanical breakdown. He confirmed that the eventual charge for standing time had been significantly reduced after the plaintiff had passed on a discount of R51 313, 00. Parmeshwar further explained that the standing time was calculated using the analysis from an electronic tracking reporting system which activates when the truck reaches the border, and once the 48 hour "free" standing time elapses. That concluded the evidence on behalf of the plaintiff.

[21] The defendant called as its first witness Paul Osborne who testified that the defendant approached the plaintiff to provide logistical services for the transportation of used IT and cellular communications equipment in October 2014. The reason for non-payment was attributed to the rates charged, as well as the amounts charged for standing time.

[22] When the trial resumed in March 2017, the parties had reached an agreement that in respect of the plaintiff's claim 3A and 3B, the only items in dispute was that of standing time charges. Accordingly, this judgement does not concern itself with the testimony of the witnesses regarding the rates charged by the plaintiff. In so far as the claim in convention is concerned, the summary of the evidence of the witnesses is confined to the dispute relating to standing time. It was further agreed by the parties at the resumption of the trial that in the event

of the plaintiff being successful in regard to the claim in convention, and if the defendant succeeded in its claim in reconvention, the plaintiff would not execute on its judgement until the quantum in respect of the claim in reconvention was finalised.

[23] The evidence of Mr Osborne, in summary, was that the defendant should not be held liable for the breakdown of any of the trucks transporting goods on behalf of the plaintiff, and consequently it assumed no liability for standing time. As I understood the witness's evidence, he contended that the haulier was acting on behalf of the plaintiff and not on behalf of the defendant. To the extent that there may have been a mechanical breakdown involving one of the trucks, Mr Osborne's view was that the defendant could not be held liable for the standing time incurred at the border crossing. It is common cause that the consignment from Harare to Durban was held up at the border post of Zimbabwe and South Africa because only one customs document, referred to as a 'CV1', was available for four trucks travelling in convoy. In such a scenario, if one of the trucks suffered a mechanical breakdown, the other three trucks were unable to proceed through customs without the fourth truck joining them. Mr Osborne further testified that a new 'CV1' document had to be obtained in respect of the Zimbabwean consignment.

[24] In respect of the contention that Ms Osborne had agreed to pay the plaintiff the amount of standing charges contained in its invoice, Mr Osborne stated that Ms Osborne had no authority to negotiate or to reduce standing time charges. He stated that the standing time charges caused problems for the defendant and their clients had objected to paying these charges. In some cases, the defendant reached a compromise with its clients in relation to payment for these amounts, with it absorbing some of those costs. No specific examples were provided of dissatisfied clients or the amounts absorbed on their behalf.

[25] What emerged from Mr Osborne's evidence was that upon receipt of the invoice from the plaintiff, the invoice was passed on to the client (SIMS) for payment to the defendant. Despite the contestation regarding standing time and the refusal of the defendant to pay these invoices, based on this alleged

breach, Mr Osborne was unable to confirm whether the defendant invoiced SIMS for the full amount which it had been charged by the plaintiff. He was invited by the plaintiff's counsel to produce the invoice which the defendant forwarded to SIMS Recycling for payment. The point made by the plaintiff's counsel is that while the complaint of the defendant is that they refused to pay the invoice on the grounds that it included a charge for standing time, the defendant nonetheless invoiced SIMS Recycling for those amounts, and in the absence of proof to the contrary, one must accept that they were paid in full, including the amount for standing time. As such, it was submitted the defendant incurred no loss and consequently it is unable to sustain a defence for the non-payment for charges. The defendant suffered no damages and no prejudice as a result of the plaintiff charging for standing time. In any event, it is the plaintiff's case that the charges in respect of standing time were agreed to by Ms Osborne, acting on behalf of the defendant, and representing the interests of her client, SIMS. This is evident from the email from Ms Osborne to Botha on 27 February 2015. This concluded Mr Osborne's evidence on the main claim.

[26] In so far as the defendant's counterclaim is concerned, Mr Osborne testified at length regarding the Working Document, otherwise known as a Non-Circumvention Agreement, which essentially is a contract which precludes an entity, such as the plaintiff, from poaching or taking unfair advantage of the contact with the supplier of used IT goods either in Nigeria or Zimbabwe, and of the pricing structure which the plaintiff would acquire access to. The agreement was further intended to prevent a clearing and forwarding agent, like the plaintiff, from going behind the back of the defendant, and dealing directly with the customer like SIMS, to import and export goods directly on their behalf. Mr Osborne aptly described the purpose of the document as being to minimise the risk of poaching clients. Accordingly to him, the claim in reconvention is based on such an agreement having been signed by Botha representing the plaintiff, and Ms Osborne representing the defendant.

[27] Mr Osborne testified that the plaintiff acquired knowledge of the defendant's pricing structures and used this as a means to directly approach its client,

Eriksson Nigeria, to provide logistical services to them, thereby undercutting or excluding the defendant from such contracts. He testified that upon being shown an email dated 20 March 2015 from Botha, who had signed the Non-Circumvention agreement on behalf of the plaintiff, he was infuriated that Botha would try to undercut the defendant, especially as he had known him personally for many years as a family friend. Mr Osborne testified that he contacted Botha and confronted him regarding the contents of the letter of 20 March 2015. It is prudent at this stage to set out the contents of the email from Botha to Kim Clemence-Wolfaardt at Ericsson in Sweden. It reads as follows :

> "As discussed, we are very much interested in learning more about Ericsson's global import/export requirements on all trade lines.
>
> Very briefly, but about Brunel …
>
> We are, to this day, a family run, British business with our own offices in the UK, India, Hong Kong/China, the USA, South Africa, West Africa (Nigeria/Ghana), and the UAE. We place great emphasis on not only offering a competitive price structure, but also a first-class and personalised customer service. We have successfully established a global presence which enables us to structure visible and efficient supply chain solutions - a full door-to-door service if need be - whether cargoes are moving by land, sea or air. We are an authorised economic operator (customs) ……
>
> We are fully accredited with customs at all border in entries / ports, and as such all customs clearances are handled in-house and not subbed out to third party clearing houses.
>
> As mentioned telephonically, we have been working with Emanuel Abugu of Eriksson Nigeria on export trade from Nigeria into South Africa, and he is interested in working more with our Nigerian operations (Brunel Logistics Global Solutions Ltd) in the import traffic. It is most notable that BLGSL has gone ahead on its own initiative to apply to the Nigerian Federal Ministry of Environment and Nigerian Communications Commission for permission for export of used and discarded communication equipment on behalf of Eriksson Nigeria - a move no other forwarder has made. BLGSL has a dedicated team who not only provide updates to clients on import documentation requirements, but also harness the local expertise … to offer customised services.
>
> We are keen to further discuss your total transportation requirements with the view to submitting costs/proposals all the trade lines, even if it is only

> for cost comparisons. We do believe we are able to offer cost savings and certainly a high level of customer focused services.
> ……"

[28] According to Mr Osborne, Botha denied that he acted maliciously or with the intent to undercut or deprive the defendant of profits from cross-border imports. In light of Botha's conduct, Osborne believed that the defendant had suffered significant damages as the defendant was forced to amend its pricing structure in order to remain competitive in the marketplace. Clients also began to question the pricing of the defendant, resulting in many customers having to be re-quoted. Mr Osborne stated that the defendant was approached by SIMS enquiring why others were getting involved in their business of importing used cellular parts from Nigeria. It is at this juncture, according to Mr Osborne, that SIMS brought to his attention Botha's email. In light of Botha's conduct, Mr Osborne decided not to pay the plaintiff's invoices as the damages caused to the defendant's business far exceeded the amount claimed in the plaintiff's invoices. He also considered it objectionable that the plaintiff could charge interest on the standing time claimed in the invoices. He contended that the plaintiff is responsible for ensuring that all of the customs documents are in order and as such, the defendant should not be held liable for the standing time charges incurred where the customs documents were not present.

[29] Mr Osborne further denied that he had signed a document stipulating the trading terms and conditions under which the plaintiff undertook to contract with the defendant. According to him, he had never seen the document before.

[30] Under cross-examination, Mr Osborne advanced a rather feeble explanation for the defendant not being able to produce the invoice which it forwarded to its client, SIMS Recycling, in respect of the consignment brought in from Zimbabwe, suggesting that the Court proceedings finished late the day before. He admitted that in general, the plaintiff would invoice him and he would place a mark-up on the amount, thereafter invoicing his client. It would follow therefor that the defendant would make a profit over and above what it paid to the plaintiff. As such, it suffered no damages by virtue of the plaintiff having

charged it standing time. Moreover, it was put to Mr Osborne that the failure of the defendant to produce its invoice to SIMS, it is unable to deny the plaintiff's contention that even the reduction in standing time which the plaintiff had negotiated with its haulier and passed on to the defendant, had not been passed on to SIMS.

[31] In so far as the defendant's claim in reconvention, which is based on damages sustained as a result of the plaintiff's breach of the non-circumvention agreement, Mr Osborne testified that he instructed Ms Osborne to sign the document on behalf of the defendant as he was out of the country. She signed the agreement on 1 October 2014 and forwarded it to Botha for his signature, as he represented the plaintiff at the time. Some days later, on 10 October 2014 Botha sent through his copy of the agreement, duly signed.

[32] Mr Osborne was cross examined at length on the contents of the defendants plea in which it is contended that the non-circumvention agreement was signed by Botha on behalf of the plaintiff and by Mr Osborne on behalf of the defendant. The problem which presents itself is that on the documents before me, only Ms Osborne appears to have signed the non-circumvention agreement on behalf of the defendant. According to Mr Osborne, it was imperative that the non-circumvention agreement to be signed as the consignment for SIMS was 'already on the seas'. This aspect of his evidence is placed in doubt from the evidence of Ms Osborne who stated that at the time when she signed the non-circumvention agreement, the consignment had not yet been finalised, nor had it left Nigeria for South Africa.

[33] In so far as the non-circumvention agreement is concerned, it was put to Mr Osborne that Mr Graham Bott of Brunel UK was not satisfied with the terms of the agreement. Bott indicated that the plaintiff would be prepared to sign the document, subject to the caveat restricting the agreement to the Nigerian-South African trade handled by the defendant on behalf of the SIMS Metal Group. He further stated in an email of 2 October 2014 that if future business opportunities arose, the agreement could be amended as necessary. It was put to Mr Osborne that in light of there being no disagreement advanced by the

defendant to the suggested caveat, Botha went ahead and signed the non-circumvention agreement on behalf of the plaintiff.

[34] In so far as the loss which the defendant contends that it sustained, it alleges that this was due to Botha poaching its clients or undermining its business. Mr Osborne considered the email of 20 March 2015 as Botha seeking to prize away the export trade from Nigeria into South Africa of used IT communications equipment. Mr Osborne was particularly upset at the suggestion from Botha in his email to Kim Clemence the plaintiff was able to offer cost savings and a high level of customer focused service if Ericsson elected to do business with it. Mr Osborne was unable to point to a shred of evidence in respect of the documents placed before the court, to show that the plaintiff had either directly or indirectly carried out work for SIMS Recycling as a result of the email dated 20th of March 2015, or that it had earned any revenue by soliciting clients of the defendant.

[35] In my view, the fears of the defendant were entirely speculative without any evidence that Botha had acted in contravention of the non-circumvention agreement. On the contrary, it was put to the witness that Botha would give evidence that he had no intention of importing scrap telecommunications equipment into South Africa and did not act in any way that impinged on the territory of the defendant. The witness was unable to point to any document or produce any evidence to substantiate the allegation that the plaintiff or Botha had undercut it or offered to carry out work at more competitive prices than the defendant. Mr Osborne was unable to refute the proposition put to him that Botha would say that not a shred of business emanated from his email. Moreover, Botha's interpretation of the disputed email is that it pertained to importation of goods from Sweden to Nigeria and had nothing whatsoever to do with the trade routes of the defendant from Nigeria to South Africa. This was also, according to the plaintiff, how Kim Clemence understood Botha's email to her. Mr Osborne was also unable to refute the suggestion that the email was intended to canvass the issue of importation of new, as opposed to scrap goods. Despite there being nothing to counter the averments put to Mr Osborne, the latter was adamant, as set out in the counterclaim, that the

plaintiff contracted directly with Erikson and other suppliers at prices "*that excluded and/or diverted the brokerage and/or facilitation fees that would have been earned by the Defendant on such transactions*". As set out earlier, there was no evidence to support this opinion held by the defendant. Eventually, Mr Osborne revealed that the defendant had lost SIMS as a client "completely". He accepted under cross examination that he had no documents which could prove that SIMS had been offered a better price by the Plaintiff.

[36] The only document which the defendant relied on for its contention that the plaintiff had caused it loss of revenue is an email from the director at SIMS Recycling on 7 April 2016 in which she says that she was unable to engage the services of the defendant as she had received a better rate from "another transporter". Both Paul Osborne and Tamryn Osborne assumed that this response from SIMS Recycling was suggestive of the plaintiff being the "other transporter". Neither witness was able to point to any evidence that implicated the plaintiff as being the entity that was engaged by SIMS or which offered a better price then the defendant. Counsel for the plaintiff submitted that this email constituted the high water-mark of the defendant's claim that the plaintiff had breached the agreement.

[37] Mr Osborne further conceded that at the time when Botha both wrote to him concerning the amounts of the outstanding invoice, his response was that he would attend to finalising the account.

[38] It was further put to Mr Osborne that the agreement which signed by Ms Osborne and the page bearing the signature of Botha, are not the same. The only conclusion that one can draw from this is that Ms Osborne signed a document at the time when Botha was not present. Both signed two separate pages (page 3 of the agreement) which were considered as one for the purposes of the contract. The essence of the defence to the contravention of the non-circumvention agreement is that Botha signed the agreement on the understanding that the agreement would be restricted to the trade between Nigeria and SIMS Recycling in South Africa. It should be noted that Bott's email is dated 2 October 2014, the same date as when Botha signed the

agreement on behalf of the plaintiff. This lends credence to the version of the defendant that Botha signed the agreement on the basis of the restrictive interpretation, as set out in Bott's email.

[39] Mr Osborne further confirmed that the defendant received the invoices and in emails that passed between the parties from 13 October 2014 to 25 March 2015, the issue of standing time had never been raised as a basis for non-payment. On the contrary, Mr Osborne thanked the plaintiff for being patient in holding out for payment. As at 16 March 2015, Mr Osborne had received the plaintiff's invoices for R174 547 and R122 365. He raised no objection to payment on the basis of standing time or any other ground. It was only on 11 April 2016, according to the emails contained in the bundle of documents, that SIMS brought it to the defendant's attention that they were able to get a better rate for the transportation of goods from Eriksson's. There is no indication on the email from SIMS that they had migrated to the services offered by the plaintiff or that the plaintiff had in any way been responsible for the change in their decision to use someone other than the defendant as their service provider.

[40] Finally, when it was put to Mr Osborne that Ms Osborne had indeed agreed, as evidenced by the emails between herself and the plaintiff's employees, to the charges for standing time incurred in the transportation of goods for the defendant, he denied that she had the authority to accept such charges. He was unable to offer any explanation as to why this aspect had not been raised with the plaintiff's witnesses during cross examination and during which time he had been present in court.

[41] The re-examination of the Mr Osborne was in my view a belated attempt to rescue several holes in the defendant's case. When it was put to him that the defendant agreed to the restrictive interpretation proposed by Bott in his email, he denied this but offered no proof of rebuttal other than to say that Ms Osborne had to act speedily. In his view, Botha had no prior business experience in Nigeria and it was he (Mr Osborne) who introduced him to that market. Mr Osborne was aggrieved that Botha sought to undercut the rates

that the defendant offered to Nigerian customers, although he conceded that he did not have any proof of this this.

[42] The next witness for the defendant was Tamryn Lee Osborne (Ms Osborne), formerly employed as the logistics manager for the defendant and who managed the account of SIMS Recycling during the period of her employment. She testified that she provided a comprehensive service to SIMS in respect of the importation of second-hand cellular phone and IT equipment from Eriksson's in Zimbabwe, Nigeria, Mauritius and Johannesburg to the warehouse of the client, located in Balito, KwaZulu-Natal. She specially mentioned that she attended to all other arrangements on behalf of SIMS, other than for processing customs documentation which were left to the plaintiff. It emerged that she had known Mr Troy Botha as a family friend, and that they had previously worked together. According to her, the general manager of SIMS, Hellen Werth, was weary of clearing agents acquiring information as to the identity of the supplier of the used goods in Nigeria. Similarly, the defendant was also averse to the clearing agents acquiring such information, as they could potentially undercut the rates offered by the defendant, and consequently force the defendant out of the logistics chain. Put differently, the defendant also wished to prevent the plaintiff doing business directly with their client, in this case, SIMS.

[43] Ms Osborne signed the non-circumvention agreement on 1 October 2014 and forwarded it to Botha for his signature. On her version, she had obtained authorisation from Mr Osborne to sign the necessary documentation on his behalf. Later in evidence she stated that she forwarded an unsigned copy of the agreement to Botha for signature. Only after he returned his signed copy of the agreement to her, did Mr Osborne sign the agreement on behalf of the defendant. The uncertainty as to when and who signed the agreement on behalf of the defendant is apparent from Ms Osborne's evidence that she signed the agreement on 1 October 2014. There was much dispute about the agreement relied on by the defendant in its plea and counterclaim, which only contains the signature of Botha. The plaintiff contends that to the extent that the

defendant relies on this agreement, it is not binding and gives rise to no contractual obligations.

[44] On the understanding that the non-circumvention agreement was in place, the parties continued with their business relationship without any problems until the emergence of the email of 20 March 2015 from Troy Botha to Kim Clemence, in which Botha sought to make enquiries regarding Eriksson's global import and export requirements on "all trade lanes". Ms Osborne was very upset when she acquired knowledge of the email and took it as a personal affront. She interpreted the email as an attempt by Botha to undercut her rates at which she was transacting for SIMS, and to undertake work directly from Erikssons. She was of the view that the plaintiff had only started to work in Nigeria via her introduction, and hence her strong response to what in her mind was Botha attempting to take business away from her. She confirmed that since December 2016 she had no contact or business with Eriksson and confirmed that SIMS had last used her services in December 2016. Following the communication from SIMS in April 2016 that they were able to obtain a better rate from another transporter, Ms Osborne stated that she was compelled to reduce her rates, not only with SIMS but with other clients as well, in order to stay competitive. In the process, the defendant sustained losses as well as having clients leave them for others. The underlying thread of her evidence was that she attributed all of the blame to the actions of Botha, who she said had tried to cut her out of business emanating from Nigeria.

[45] In relation to the defendant's refusal to pay the plaintiff's invoice for standing time, MS Osborne was aware of the trucks travelling in a convoy from Zimbabwe, in which the fourth vehicle encountered a mechanical breakdown, causing a delay in the clearance of all of the vehicles, as they were using one CV1 form to clear customs. Ms Osborne was subjected to intense cross-examination from the plaintiff's counsel who canvassed at the outset the foundation for the defendant's counterclaim, which is premised on the plaintiff's breach of the non-circumvention agreement. As a result the defendant alleges that it lost business sourced from Eriksson and/or SIMS and that the defendant was unable to do the same volumes of business as it was forced to reduce its

rates. Consequently the defendant alleges that it sustained loss in the amount of R1 626 445, 80, and that such loss was ongoing. The counterclaim is pleaded in terms that state specifically that the reason for the loss of business was that the plaintiff started contracting directly with Eriksson and other suppliers '*at prices that exclude and/or divert the brokerage and facilitation fees that would have been earned by the defendant*". Under cross examination, Ms Osborne conceded that the only evidence supposedly in support of this assertion is the email of Troy Botha of 20 March 2015. She further conceded that she had no proof of any orders placed by SIMS with the plaintiff, nor was she aware of any emails addressed by the plaintiff to SIMS attempting to solicit business. She conceded that nowhere in any of the emails which have been placed before the court, is there any suggestion or hint of Botha offering his services at a rate less than that quoted or customarily charged by the defendant. Even when considering the email from Helen Werth of SIMS dated 11 April 2016, in which she indicated that she had obtained a better rate from another transporter, there is no indication at all of Botha attempting to undercut the defendant. Ms Osborne stated further that Helen Werth was not available to testify in the matter and therefor unable to shed further light on her email, nor was anyone else from SIMS prepared to testify in support of the defendant. In light of this, one is left with the inference and supposition drawn from a single email written by Botha that he was attempting to circumvent the working relationship which the defendant jealously guarded with its Nigerian supplier.

[46] As set out earlier, there are disputing versions as to who exactly signed the non-circumvention agreement on behalf of the defendant, and counsel for the plaintiff attempted to sow some doubt as to Ms Osborne's authority to sign t on behalf of the defendant, particularly in light of Mr Osborne's evidence that his daughter had lacked authority to agree on the rates without him being consulted. Ms Osborne was unable to refute the contention that Botha did not conclude any business as a result of the email which she considered to be 'offensive' and an attempt to undercut the defendant. In addition, other than relying on the aforementioned email, she was unable to refute the assertion that Botha had no intention of treading on the terrain of the defendant.

[47] Mr *Havemann* for the defendant then made an 'unfortunate' decision to call Mr Troy Botha as a witness, fully knowing that the plaintiff's case was that Mr Botha never had any intention to undercut the defendant's business in Nigeria, nor had he benefited from any business deal as a result of the email of 20 March 2015, which caused such opprobrium from Paul and Tamryn Osborne. Botha was questioned regarding his email to Kingsley Egbuna, the general manager of Brunel Logistics Global Solutions Ltd, based in Nigeria. According to him, the plaintiff had discussions with Egbuna in relation to shipping scrap cellular phone equipment. He personally had no contact with Egbuna, but admitted that the email of 17 December 2014 contained the address of Kim Clemence of Eriksson in Sweden, whom he subsequently wrote to on 20 March 2015. While Botha admitted to signing the non-circumvention agreement forwarded to him by Ms Osborne, he believed that he was signing the agreement in the context of the email sent by Mr Bott, to the effect that the agreement would be restricted to the South African/Nigerian trade lane.

[48] In light of the testimony of Botha not eliciting the expected answers, particularly those pertaining to the email of 20 March 2015 to Kim Clemence at Erikson in Sweden and others associated with Brunel GSL (Nigeria), United Kingdom and South Africa, Mr *Havemann* brought an application to have Botha declared a hostile witness,. As the plaintiff was taken somewhat by surprise by the application, I afforded the parties an opportunity to advance argument on the issue, substantiated by reference to case authority. Schwikkard, *Principles of Evidence*, 2nd edition (2002), para 25:3.3 points out that the purpose of such an application is to obtain the right to cross-examine one's own witness in the same way as if the latter had been called by an opponent. The decision to bring such an application is a tactical one, and the party bringing the application has the burden of satisfying the court that the witness is "not desirous of telling the truth at the instance of the party calling him". It has been held that an antagonistic *animus* must be proved, with the test being a subjective one. *S v Steyn en andere* 1987 (1) SA 353 (W) at 58G-H. The party seeking a declaration of hostility must prove that the witness has an antagonistic *animus* so that he may cross-examine him — and yet if he could cross-examine, he would have a better chance of exposing the required *animus.*

[49] While the defendant submitted that Botha's answers had been sarcastic in relation to his interpretation of the non-circumvention agreement, the plaintiff's counsel contended that the fact that Botha has given evidence contradicting what was expected of him by the defendant does not *per se* render him hostile. Equally, the defendant could not have been surprised at the answers emanating from Botha. It was always the plaintiff's case that Botha denied breaching the non-circumvention agreement. He is the prime opponent of the defendant's case, and despite being so aware, the defendant proceeded to call him to testify in support of its cause. I agree with the plaintiff's argument that the defendant knowingly called Botha as a witness, and having made that election, they cannot seek to escape the consequences of their decision by declaring him to be hostile. Moreover, in my view there was nothing in Botha's demeanour or from his behaviour in the witness box that could be cause to consider him to be 'hostile'. See *Meyer's Trustees v Malan* 1911 TPD 559.

[50] For these reasons, the interlocutory application was dismissed.

[51] Botha was recalled and questioned regarding the defendant's counter-claim emanating from the alleged breach of the non-circumvention agreement. Botha denied that the agreement had been breached and stated that he had not done any work for Erikson's other than through the defendant. Under cross examination, Botha disagreed with the contention contained in the defendant's counterclaim that the latter sustained loss of business as a result of the plaintiff stealing clients and allegedly contracting directly with Ericsson and other suppliers. In so far as the email of 17 December 2014 from Kingsley Egbuna to him, Botha said that he interpreted this as an attempt by Brunel Logistics Global Solutions (Nigeria) wanting to be registered as an importer of finished goods from Sweden. His email to Kim Clemence on 20 March 2015 was the result of a prompt from Egbuna on 12 February 2015. Botha stated that his email was simply an enquiry as to how finished goods from Sweden could be imported into Nigeria. He had no intention of harming the business of the defendant, and was adamant that no business emanated from his approach to Kim Clemence, nor did he ever provide SIMS with a quote for the importation of goods from Nigeria.

[52] Botha confirmed that he received an email from Paul Osborne on 25 March 2015 in which he was advised that the defendant was terminating all its business dealings with the plaintiff in light of their "unethical breach of the non-circumvention agreement" and upon taking legal advice, they were withholding all payment due to the plaintiff until they decided on a course of action in respect of the alleged breach. In response, Bott denied the allegations levelled against the plaintiff and demanded that the defendant make payment of the freight and other charges which were outstanding. The matter thereafter was placed in the hands of the attorneys for the respective parties.

[53] In relation to his signing of the non-circumvention agreement, Botha confirmed that he only signed the agreement after the email from Bott had been sent, in which the plaintiff set out the caveat pertaining to the agreement. In so far as the agreement which he signed, he was clear that Ms Osborne never gave him a hard copy of the agreement. All that he received from her was an email containing an attachment, which he signed and handed back to her..

[54] The defendant then closed its case after which counsel for the plaintiff applied for absolution in respect of the claim in the convention on the basis that the defendant had failed to make out any case that the loss of the business which it sustained was shown to be attributable to the plaintiff contracting directly with Erikson or any other supplier. Counsel further submitted that both Paul and Tamryn Osborne conceded in their testimony that there was no direct evidence or proof that the plaintiff had indeed circumvented the defendant, and sought to transact directly with the defendant's suppliers. The test for absolution from the instance at the end of a plaintiff's case is well established. It is set out in the following passage from *Gordon Lloyd Page & Associates v Rivera and Another* 2001 (1) SA 88 (SCA):

> '[2] The test for absolution to be applied by a trial court at the end of a plaintiff's case was formulated in *Claude Neon Lights (SA) Ltd v Daniel*1976 (4) SA 403 (A) at 409G - H in these terms:
>
> > '. . . (W)hen absolution from the instance is sought at the close of plaintiff's case, the test to be applied is not whether the evidence led by plaintiff establishes what would finally be required to be established, but whether there is evidence upon which a Court, applying its mind

> reasonably to such evidence, could or might (not should, nor ought to) find for the plaintiff …"
>
> This implies that a plaintiff has to make out a *prima facie* case - in the sense that there is evidence relating to all the elements of the claim - to survive absolution because without such evidence no court could find for the plaintiff … As far as inferences from the evidence are concerned, the inference relied upon by the plaintiff must be a reasonable one, not the only reasonable one … The test has from time to time been formulated in different terms, especially it has been said that the court must consider whether there is 'evidence upon which a reasonable man might find for the plaintiff'…Such a formulation tends to cloud the issue. The court ought not to be concerned with what someone else might think; it should rather be concerned with its own judgment and not that of another 'reasonable' person or court. Having said this, absolution at the end of."'

[55] I concluded that absolution from the instance should not be granted, but in light of the decision *Gafoor v Unie Versekeringsadviseurs (Edms) Bpk* 1961 (1) SA 335 (A) at 340D-G I avoided a discussion of the evidence, lest either party would formulate an opinion that I may have taken a view of the merits of the matter, which should only be determined at the end of the whole case. Following my decision on absolution, the plaintiff elected to close its case in respect of the counterclaim.

[56] In evaluating the evidence in respect of the main claim, the plaintiff initially claimed a total of R532 944.20. At the commencement of the trial the plaintiff produced a Master Schedule which detailed the total of each invoice issued to the defendant, any credit notes passed and the totals due in respect of each claim. The total amount claimed as per the master schedule is R463, 244, 89. Pursuant to the evidence of the plaintiff's witness, Mr Parmeshwar, the plaintiff conceded that the amount in respect of claim 1 contained an overcharge in the amount of R145, 00. As a result, the plaintiff's amended claim is the amount of R 463, 099, 89.

[57] The defendant's plea admitted that the services were rendered by the plaintiff as alleged in the particulars of claim. It however put the plaintiff to the proof that the amounts contained in the invoices were *correctly calculated*. It therefore denied owing the total amount initially claimed, without conceding what amount

if any it was liable for as a result of the services which had been rendered by the plaintiff. It was only after considerable time had been spent by the plaintiff leading evidence of its witness laboriously in relation to each and every item set out in its invoices, did the defendant eventually concede that the only dispute in relation to claim 3A and 3B as per the Master Schedule, was the issue of standing time. The disputed amount in claim 3A was R52, 500, 00 and R49 687.00 in respect of claim 3B.

[58] In respect of claim 3A, the documentary evidence reveals that Botha wrote to Ms Osborne indicating to her that the charges for standing time in respect of the particular consignment was R52,500 calculated on the basis of R3 500 per day, per truck. The trucks were delayed at the border post for 10 and 11 days respectively. The amount of R52 500.00 represented a reduced fee, taking into account that the initial period of 48 hours standing time is absorbed by the transporter. In response, the evidence was that Ms Osborne accepted the charges after discussion with her client. As stated earlier, the defendant's plea merely contested the *calculation* of the amounts contained in the invoice. In his testimony, Mr Osborne sought to contend that Ms Osborne did not have the authority to negotiate rates or deal with the issue of standing time charges in the manner in which she did. This however was denied by her, and she contended that she had the necessary authority to accept the charges. The evidence of the plaintiff, supported by the exchange of emails, clearly reflects that the amount charged to the defendant was for standing time, and the amount eventually charged was as a result of an agreement reached between the parties. At the Rule 37 conference the plaintiff enquired from the defendant what amount it alleges was due to the plaintiff. In response the defendant conceded that the plaintiff was entitled to charge the rates claimed, but for the defences raised by the plaintiff. The latter aspect pertains to the alleged breach of the non-circumvention agreement and the consequent loss flowing therefrom. In my view, the evidence of the plaintiff on this claim is largely uncontested, there were no inherent improbabilities from the evidence of the plaintiff's witness and no defence mounted thereto.

[59] In respect of claim 3B, the evidence of Parmeshwar was largely unchallenged. It was apparent from his evidence that standing time was incurred and the plaintiff charged the usual rate in this regard. The delay which was occasioned was caused because of a new CV1 customs document which had to be obtained. While the plaintiff submitted that this was the responsibility for the customer (defendant), Ms Osborne attempted to deflect responsibility for this to the plaintiff. The imputation that this was the responsibility of the plaintiff flies in the face of the admission by Osborne that they supplied a new CV1 document to enable the convoy to clear customs after the initial delay.

[60] Counsel for the plaintiff submitted that it was not open to the defendant to challenge the plaintiff's entitlement to charge standing time, particularly in light of the defendant's admission that the plaintiff was entitled to charge the rates claimed. The plaintiff was meticulous in keeping the defendant informed of the delays at the border, resulting in the incurring of standing time charges. The version of the plaintiff's witness as regards the single CV1 form which had to be provided by the defendant is in my view more probable than that of the version of Ms Osborne, who attempted to shift blame to the plaintiff for the documentation.

[61] Moreover, the amounts charged by the plaintiff were arrived at after the passing of a number of discounts. The admission by Mr Osborne that the total amount of the invoice presented to it by the plaintiff, inclusive of the amount for standing time, was paid by SIMS Recycling, is fatal to the defendant's case. Not only did SIMS pay the full amount invoiced by the plaintiff, but the defendant added to the invoice an amount representing its mark-up for services rendered. It therefor made a profit from the transaction. No evidence was put up by the defendant as to the actual amount which it invoiced SIMS for the work done. It is not even known whether the defendant passed on to SIMS the reductions which the plaintiff reflected in its invoice. In light of this, the question arises of what prejudice or hardship the defendant has suffered, which warrants its refusal to pay the amount charged by the plaintiff. In my view, the defendant has failed to mount any lawful basis to justify denying payment of the amount claimed to the plaintiff. Ultimately, it would appear that the decision to withhold

payment, which is precluded by the standard trading terms and conditions applicable to the parties, was the result of Botha's alleged breach of the non-circumvention agreement. Clause 27 of the said agreement provides

> 'unless otherwise specifically agreed by the company in writing the customer shall pay to the company in cash immediately upon presentation of account all sums due to the company without deduction or set-off andpayments shall not be withheld or deferred on account of any claim or contact claim which the customer may allege.'

It would appear that contractually, even if the defendant believed that it has a valid counterclaim, in terms of its agreement with the defendant, the latter cannot withhold payment due to the plaintiff. On an evaluation of the evidence before me, I am of the view that the plaintiff must prevail in respect of its claim as amended in terms of the Master Schedule. Counsel for the plaintiff submitted that the main claim should be upheld with costs on an attorney client scale. While those that represented the defendant changed course in mid-stream and unnecessarily curtailed the duration of the trial by requiring the plaintiff to lead evidence of matters which they later indicated were not in dispute, it would be unfair in my view to mulct the defendant with costs on a punitive scale.

For the reasons set out above, the plaintiff must prevail in respect of its claim in the main action.

[62] Regarding the counterclaim based on the perceived breached the non-circumvention agreement, the evidence was that a copy of the agreement was forwarded to Troy Botha to sign on behalf of the plaintiff. On Botha's version, substantiated by an email from Graham Bott, the latter had no objection to the agreement, on the basis of the caveat that the agreement would only apply to the South African-Nigerian trade lanes. There is a dispute as to who signed the non-circumvention agreement on behalf of the defendant, particularly as the document annexed .to the pleadings was not signed by either Paul or Tamryn Osborne. The copy relied upon by the defendant, and annexed to the pleadings, bears the signature of Botha alone. There is no corresponding signature of behalf of the defendant. On the basis alone, the plaintiff contends

that no valid agreement was concluded between the parties as clause 9 of the agreement makes it binding only upon signature. To the extent that the defendant bears the onus of adducing evidence to establish the existence of a signed non-circumvention agreement, the evidence of the defendant's witnesses were unsatisfactory and unconvincing.

[63] The evidence of both Paul and Tamryn Osborne was such that neither could point to a single email in the bundle of documents placed before this court to justify their conclusion that Troy Botha either attempted to undercut or did do so to their business. There is nothing to gainsay this version, confirmed by Troy Botha himself, even after the defendant attempted to have him declared a hostile witness. The evidence failed to implicate Botha of soliciting clients away from the defendant, and there is not one shred of evidence to suggest that he benefited directly or indirectly from the email he addressed to Ericsson's in Sweden. The Osborne's felt betrayed by Botha, whom they had known as a family friend. The defendant's counterclaim is based on a speculative hypothesis that its loss of business could be attributed to Troy Botha's email to Ericsson. The defendant, in my view, has failed to show any causal nexus between the losses that they allege to have sustained and the email by Troy Botha.

[64] In the result I am satisfied that the defendant has failed to make out a case for the contravention of the non-circumvention agreement as alleged. I would accordingly dismiss the defendant's counterclaim. I see no reason why costs should not follow the result.

[65] In the premises I make the following order

1. Judgment is granted in favour of the Plaintiff in the main action in sum of R463 099,89;
2. Interest on the aforesaid amount at the rate of 9% per annum, from date of summons to date of final payment;
3. Cost of suit.
4. The Defendant's counterclaim is dismissed, with costs.

_____

M R CHETTY

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Date of hearing:	**8, 9, 10 June 2016, 15, 16, 17 March 2017**
Date of Judgment:	**28 July 2017**