IN THE REGIONAL COURT FOR THE DIVISION OF KWAZULU-NATAL

HELD AT DURBAN

In the matter between CASE NUMBER 5580/19

CHIEN HUI KAO (AKA HELLEN KAO) PLAINTIFF

And

COMMISSIONER OF CUSTOMS AND EXCISE RESPONDENT

JUDGMENT

1. The Applicant, an adult female, brought an application in terms of our common law remedy of *rei vindicatio*, asking for an order that the Respondent returns to her (i) the sum of R108 328.75 which she claims to have paid to Respondent as a provisional payment on 11 November 2013 and (ii) the sum of R302 393.16 which she claims to have paid to the Respondent as a provisional payment on 25 September 2013. The Respondent, the Commissioner for Customs and Excise resists the application on the grounds that (i) the Applicant may not avail herself of the *rei vindicatio* and (ii) Applicant has always failed to meet the requirements for the repayments in terms of the provisions of the Customs and Excise Act 91 of 1964.

2. The Applicant has averred that the monies were paid as provisional payments for the transportation of containers. She has also stated that she is the lawful owner of the money. Her averment about the purpose of the payment is that she facilitated the payment from Johannesburg as a forwarding agent and therefore, she was responsible for making provisional payments to Customs at Durban for the release of the containers.

3. The Applicant also stated that she was charged with Fraud in relation to the containers and that she was acquitted of these charges on 31 January 2018. She then instructed her legal representative to meet with Respondent's representatives on numerous occasions. These meetings

were, obviously, about the repayment of the money but the meetings did not yield positive results for the Applicant. Her understanding of Respondent's reason for refusing to refund her was that Respondent was alleging that the containers were not transported to their intended destinations.

4. Notably, she refers to the criminal case and aver that the state failed to prove that the containers were not transported to their intended destination as per the Bill of Entry. She does state that in terms of the Customs and Excise Act the money was refundable once the containers were transported to the intended destination. She emphasizes that she has a right of exclusive possession of the *res* and therefore she can claim her possession from whoever has the thing. She claims that the Respondent has no legitimate grounds or rights to withhold the payment.

5. The Respondent has raised two grounds for opposing this application. The first ground is that the claim has prescribed. The Respondent has not raised prescription against the *rei vindicatio* claim. It has asked the court to find that the nature of the claim does not avail the Applicant of the *rei vindicatio* remedy. The Respondent's submission is that, at all material times (including now) the Applicant may only have brought her claim under the provisions of the Customs Act. The second one is that the goods were dealt with contrary and in contravention of the provisions of the Customs and Excise Act 91 of 1964.

6. The relevant provisions may be summarized as follows. The process that led to the payment of money is, ordinarily called "customs clearance", and referred to in the Act as "due entry". The process regulates the payment of duties for goods that are imported into the country and those that are brought into the country in transit to other countries. After the importation or arrival of goods in the country, the importer is required to make due entry thereof in the prescribed form. This is done by submitting a bill of entry containing particulars inter alia of the goods in question and the purpose for which they are being entered, to an official designated by the

Commissioner. At the same time, unless the official designated by the Commissioner allows deferment, the duties due on the goods must be paid. If the official is satisfied, a release order is issued. Goods entered for home consumption are presumably released without further ado and what happens to them thereafter does not concern the Commissioner. Goods destined for a neighbouring country may be entered either for removal in bond (Section 18) or for storage in a customs and excise warehouse (Section 18A) for later removal upon due entry for export. In either case, if they are destined for a place beyond the borders of the country, there is an immediate liability to pay the duty. The refund of the amount paid is conditional upon it being proved to the satisfaction of the Commissioner that the goods have been duly taken out of the area. Goods removed for export from a customs and excise warehouse may not be diverted without the permission of the Commissioner to any destination other than the one declared on entry.

7. The payments made by the Applicant herein were duties for goods that were destined for places beyond the borders of this country. Due to the issues raised by the Respondent, to which I shall return later, it is proper that I summarize how the process developed in front of the officials of the Respondent. I shall refer to the two containers of goods as 741 and 163 (the last three numbers of their identifying marks) respectively.

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8. The importer of these goods was Topez Investment.[1] The goods were from China in transit to Zimbabwe.[2] Payment of duty was made on 25 September 2013. Peak Logistics demanded refund of this amount by email on 25 October 2013. They later submitted documents called CN1 and CN2. These submissions led to an investigation that revealed that the goods were released in Durban on 27 August 2013 and only reached Beitbridge on 9

[1] See Annexure H of the Answering affidavit.
[2] See Annexure H of the Answering Affidavit

October 2013. According to the respondent no record was found of the truck that conveyed the goods ever entering Zimbabwe.

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9. Respondent has, as annexures to its opposing affidavit, documents that show a mandate to one Malcolm Naidoo to help with the delivery of the consignment to Maputo. A clearing agent called Landlink Clearing began the process on 14 October 2013. When the clearing agent had to pay duties, it was Applicant who stepped forward and paid them on 11 November 2013. A company called Symphony Freight uplifted the container on 13 November 2013. An employee of the Respondent then investigated whether this container had left the country only to find it at Isipingo KwaZulu-Natal. It was empty. He was led to a place at Verulam, KwaZulu-Natal where he was shown the goods in question.

10. The above investigations led to a criminal prosecution wherein a company called Mega-Link Cargo Management CC and Applicant faced charges of fraud and contravening the provisions of the Customs Act. Count 2 related to 741 and Count 3 related to 163. The preamble to the charges details how the accused allegedly committed fraud and contravened the provisions of the Customs Act. There is no need to recount the details. Suffice to mention that the alleged misrepresentations did not appear to have been made by the accused. In any case it was always going to be the burden of the clearing agent or anyone removing the goods from customs to satisfy the Respondent that the requirements of a refund had been met. The record shows that a conviction followed only on Count 1 and an acquittal was entered in respect of the rest of the count.

11. In her founding affidavit, Applicant was content with her averment that she was acquitted in respect of the charges relating to 741 and 163. It was only after Respondent's compilation of its reasons for not paying her that Applicant sought to develop her claim around what was revealed in the criminal trial. Abridged, Applicant's account in the reply is that he admitted

and it was accepted that she was the payer of the money in respect of 741 and 163, the claims had been interrupted by the criminal prosecutions, SARS had charged that the submitted documents were fraudulent, no evidence was led in the criminal trial as to who had falsified the documents and Respondent failed to prove that the goods were not exported. These averments were put up to develop the claim based on ownership of the money.

12. In answering this question, Mr. Xulu, Counsel for the Respondent, was of the view that, if the definition of Applicant's case herein is confined as required by the Plascons-Evans Rule, no factual disputes requiring oral evidence should emerge. The said rule is captured in the following excerpt:

"...where there is a dispute as to the facts a final interdict should only be granted in notice of motion proceedings if the facts as stated by the respondents together with the admitted facts in the applicant's affidavits justify such an order... Where it is clear that the facts, though not formally admitted, cannot be denied, it must be regarded as admitted." [3]

and the following:

"It seems to me, however, this formulation of the general rule, and particularly the second sentence thereof, requires some clarification and, perhaps, qualification. It is correct that, where in proceedings on notice of motion disputes of fact have arisen on the affidavits, a final order, whether it be an interdict or some other form of relief, may be granted if those facts averred in the applicant's affidavits which have been admitted by the respondent, together with the facts alleged by the respondent, justify such an order. **The power of the Court to give such final relief on the papers before it is, however, not confined to such a situation.** In certain instances, the denial by the respondent of a fact alleged by the applicant may not be such as to raise a real, genuine or *bona fide* dispute of fact (see in this regard *Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd* 1949 (3) SA 1155 (T) at 1163 – 5*; Da Mata v Otto NO* 1972 (3) SA 858 (A) at 882D – H). *(Own emphasis added)* [4]

13. In deciding whether this court should grant the *rei vindicatio* herein, it shall first consider the requirements of this remedy and facts presented by

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3.Stellenbosch Farmers' Winery Ltd v Stellenvale Winery (Pty) Ltd 1957 (4) SA 234 (C) at 235E - G
[4] *Plascon-Evans Paints v Van Riebeeck Paints* [4] 1984 (3) SA 623 (A) at 634

the Applicant to found her case. In order to succeed with this real right remedy, the Applicant needed to allege and prove :(a) That she is the owner of the thing. (b) That the thing was in the possession of the respondent when proceedings were instituted; and (c) That the thing which is vindicated is still in existence and clearly identifiable[5].

14. It seems to me that there will be cases wherein money may be regarded as a "thing" and a subject of *rei vindicatio*. This might depend on its form. I do not agree that in this case the money claimed by the Applicant is a thing owned by her for purposes of *rei vindicatio*. It is not in dispute that the money was paid as security. One may think of this money as a refundable deposit. When a deposit is paid, the depositor's title is suspended as the refund is conditional. It was always going to be difficult for the Applicant to ignore the fact that this money was paid with the understanding that it might not be refunded. That she was aware that there were conditions attached to the repayment is clear from her reliance on the outcome of the fraud trial. I find that the Applicant is not entitled to claim ownership of the money until it is refunded. Whether the money is refundable depends on whether the conditions have been complied with. The *rei vindicatio* is therefore not available to the Applicant as a remedy herein.

15. The Applicant referred the court to the decision in the matter of Absa Bank Limited v Keet 2015 JDR 0996 (SCA) as authority for the contention that prescription does not affect a thing that is the subject of *rei vindicatio.* The contention by the Respondent does not seek to undermine the principle in the Keet case but it seeks to take the claim out of the purview of the *rei vindicatio* remedy before opening it for the application of the law relating to prescription. In so far as Respondent's ground of prescription, it may not be considered against the *rei vindicatio* remedy as Applicant is found to have failed to allege and prove the first two requirements of this remedy.

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[5] *Introduction to the Law of Property, A J van der Walt et al, Juta, 7th Ed, at 164; Silberberg and Schoeman's The Law of Property, 5th Ed, LexisNexis at 243*

16. Has the Applicant sought any other relief in these proceedings? What confuses Applicant's case is that she chose to found her claim by developing her right of ownership around her acquittal in the criminal court. An examination of what she was required to do in order to qualify for the refund will assist in deciding whether she has asked for alternative relief. Section 102(5) of the Customs Act provides as follows:

If in any prosecution under this Act or ***in any dispute in which the State****, the Minister or the Commissioner or any officer is a party, it is alleged by or on behalf of the State or the Minister or the Commissioner or such officer that any goods or plant have been or have not been imported, exported, manufactured in the Republic, removed or otherwise dealt with or in,* ***it shall be presumed*** *that such goods or plant have been or (as the case may be) have not been imported, exported, manufactured in the Republic, removed or otherwise dealt with or in, unless the contrary is proved.*

17. *In casu*, the dispute arose when the Respondent did not refund the money claiming that the goods had not been exported. The presumption was, therefore, invoked by the declaration of the dispute. The section required the Applicant or it's clearing agent to prove that the goods were exported.

18. When the Applicant initiated these proceedings, she knew that a dispute had been declared. Her case was, however, not founded on evidence that afforded proof that the goods were exported. A lenient interpretation of her founding affidavit reveals that she sought to rely on the fact that, having been charged with fraud relating to the documentary proof she had put up, she was acquitted. Though her replying affidavit expands on this contention, it does not detract from the nature of the foundation in the first affidavit. Her decision to found her right to vindicate the money on ownership was suicidal as, having defended the criminal charge and demanded the refund through her attorneys, she knew that the Respondent had not resolved the dispute. That is actually the reason why she approached the court.

19. A lenient interpretation would allow an alternative claim that is based on "proof" that the goods were exported. The Applicant sought to develop and present the required "proof "by drawing conclusions from the findings in the criminal case. She started by contending that it was accepted in the criminal case that she had paid the money which is not disputed by Respondent. She claims that the respondent failed to prove that the documents were fraudulent, no evidence was led as to who had falsified the documents, there was no evidence that the containers had not left the country. She also states that the criminal court found that the goods were exported.

20. It is clear from the documents put up by the Respondent that the Applicant was acquitted on the charges relating to 741 and 136. Whether this and the conclusions sought to be drawn by the Applicant constitute the required proof in another question.

21. It is not disputed that Malcolm Naidoo was mandated to help with the first consignment and arrange delivery to Maputo. Respondent has put up correspondence to the effect that Malcolm Naidoo may have written that the consignment had not been delivered to its destination by 15 April 2014. Naidoo also wrote about the fact that Detective Govender had confirmed that he would release the consignment. The Applicant should have considered these allegations to be worthy of a response. It is, after all, Malcolm Naidoo who had knowledge whether the goods were exported. To rely on documents that might or might not be fraudulent was not going to assist the Applicant.

22. Applicant reaches her conclusion that the goods were transported using the findings of the criminal court that led to her acquittal. Even if she had presented the record of the criminal case, it would have been impermissible to use the findings of the criminal court as those proceedings were about whether guilt had been proven beyond reasonable doubt. The correct approach would have been to require the Applicant herein to provide proof. The findings of the criminal court are not such proof. It was always going

to be difficult for the Applicant to provide proof without dealing with the evidence that was allegedly uncovered by Respondent's investigation. She has not dealt with these allegations. In fact, these allegations are so damning that, unless they are contradicted away, they compound the already onerous requirement of proof in Section 102 (5).

23. When more about the goods was expected from the clearing agents, it was the Applicant that brought this application and it did so without any credible input from them. Its reliance on the common law remedy of *rei vindicatio* sought to ignore the requirement of compliance with the provisions of the Customs Act by the clearing agent.

24. The attempt by the Applicant to develop an alternative case in the replying affidavit induced a response, by Mr. Xulu, that her case herein should actually be confined to the founding affidavit. The only material averment by the Applicant that was wrongly disputed by the Respondent is that the Applicant was acquitted in respect of the charges relating to 741 and 136. This however does not raise a real, genuine or *bona fide* dispute of fact that requires a different order than one that decides the application.[6] The decision whether to grant or dismiss the application is possible on the papers.

25. The only issue that I am unable to decide is whether the claim for the refund has prescribed. It might be academic to do so now. I have gone through the provisions of the Customs Act on dispute resolution and I have considered the effect of the criminal proceedings. In the light of the view I take on the sufficiency of proof that the goods were exported and the paucity of information in the founding affidavit, I am unable to decide whether the claim for a refund has prescribed. The parties will not suffer any prejudice if a final decision is not made on whether the claim had prescribed. In any case, the claim that was founded on the first affidavit of the Applicant failed to qualify for the order sought.

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[6] See Plascons-Evans and the reference to Roome Hire above.

26. The court is not persuaded that the Applicant has provided proof that the goods were exported.

27. In the result the following order issues:

The *rei vindicatio* application is dismissed with costs, such costs to include counsel's reasonable fee on brief.

Dated at Durban this 2nd day of November 2021.

B. S. Gumede

Regional Magistrate

KWAZULU-NATAL REGIONAL DIVISION
2021 -11- 02
MR. B. S. GUMEDE
REGIONAL COURT MAGISTRATE