IN THE HIGH COURT OF SOUTH AFRICA

(TRANSVAAL PROVINCIAL DIVISION)

PRETORIA CASES NO: 16122/98 & 17536/99

2000-10-16

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE ~~YES~~/NO
(2) OF INTEREST TO OTHER JUDGES ~~YES~~/NO
(3) REVISED ✓

DATE 29/5/2001 SIGNATURE

In the matter between

INTERNATIONAL TRAVEL SHOPS
AFRICA [PTY] LIMITED Plaintiff

and

COMMISSIONER FOR THE SA REVENUE
SERVICES 1st Defendant

AFRICA TRADING CO 2nd Defendant

In the matter between

INTERNATIONAL TRAVEL SHOPS
AFRICA [PTY] LIMITED Plaintiff

and

THE GOVERNMENT OF THE REPUBLIC
OF SOUTH AFRICA Defendant

16122/98 & 17536/99-PJ 1 JUDGMENT
Sneller Verbatim/PJ

IN THE HIGH COURT OF SOUTH AFRICA

(TRANSVAAL PROVINCIAL DIVISION)

PRETORIA CASES NO: 16122/98 & 17536/99

JUDGMENT

BERTELSMANN J: I am about to deliver judgment on the application for absolution from the instance.

The plaintiff has instituted two actions against the defendant. Both arise from the following facts. In 1997 the plaintiff was licensed to conduct duty free shops at the Beit Bridge border post. For this purpose it was licensed in terms licence BBR SOS11, a further licence BBR OS18 entitled the plaintiff to operate a bonded warehouse.

In August 1997 plaintiff was, in terms of its licence, also entitled to export goods to countries beyond the borders of South Africa. It entered into several transactions with a close corporation calling itself Afr ca Trading CC. This business was represented in the transactions with plaintiff by one Muller.

During the trial it was at all times common cause between the parties that Africa Trading was conducted, as it was put in counsel's opening address, by "a bunch of smugglers". In terms of the said agreements, which I accept at this stage were entered into by the plaintiff entirely *bona fide*, plaintiff sold several consignments of cigarettes to Africa Trading for export, ostensibly to Malawi.

The transfer of the cigarettes was undertaken by a transport business calling itself Regrub. The transaction commenced in August 1997 when the first consignments were sold to Africa Trading. Mrs Oosthuizen prepared the necessary documentation on behalf of the

plaintiff. In these documents, she indicates in the top right hand corner prominently the name and the address of the consignee to which the cigarettes were exported to.

It is common cause between the parties that the consignee indicated in this way by the supplier is a ficitious entity, its address does not exist. I will deal later in this judgment with the terms upon which the parties agreed that this was the case.

The first consignments were exported from plaintiff's warehouse. Later consignments were delivered to a warehouse which Africa Trading had obtained a licence for. Such a transaction is entirely lawful, provided the necessary documentation is regular and complete. It is common cause that the plaintiff is the exporter of the cigarettes. It is correctly so indicated in the documentation. Although there is nothing to prevent the consignee from paying South African suppliers in South African currency, eventually the consignmee must pay in foreign currency. Payment must be made either to the agent or to another intermediary where payment is not made directly to the exporter.

Goods such as cigarettes are normally subject to excise duties, but when cigarettes are obtained for export purposes, no excise duty is payable in terms of section 18A of the Customs and Excise Act 91/1964 as amended, *inter alia* by Act 45/1995.

The section reads as follows:

"Exportation of goods from customs and excise warehouse:

(1). Notwithstanding any liability for duty incurred thereby by any person in terms of any other provision of this Act,

any person who exports any goods from a customs and excise warehouse to any place outside the common customs area shall, subject to the provisions of subsection [2], be liable for the duty on all goods which he so exports.

(2). Subject to the provisions of subsection [3], any liability for duty in terms of subsection [1] shall cease when it is proved by the exporter that the said goods had been duly taken out of the common customs area.

(3). If the exporter fails to submit any such proof as is referred to in subsection [2] within a period as may be prescribed by a rule he shall upon demand by the Controller forthwith pay the duty due on those goods.

(4). No goods shall be exported in terms of this section until they have been entered for export.

(5). No such entry for export shall be tendered by or may be accepted from a person who has not furnished such security as the Commissioner may require, and the Commissioner may at any time require that the form, nature or amount of that security be altered in such a way as he may determine.

(6). The said exportation of goods shall be subject to the rules and such conditions as the Commissioner may impose in respect of the goods concerned or any class or kind of those goods or those goods exported in circumstances specified by him, and the Controller may

refuse to accept bills of entry for the said exportation of goods from an exporter who has failed to comply with the said rules or conditions or who has committed an offence referred to in section 80.

(7).....

(8). The commissioner may determine the roads and routes and the means of carriage of any goods so exported or any class or kind of those goods or any such goods carried in circumstances specified by him.

9. No person shall, without the permission of the Commissioner, divert any goods so exported to a destination other than the destination declared on entry for exportation.

10. The Commissioner may specify the documents to be produced by the exporter on entry for exportation in respect of any goods so exported or any class or kind of those goods or any such goods exported in circumstances or to a destination specified by him."

In order to ensure that goods are indeed sold for export and, once acquired for that purpose, are indeed exported, the defendant has instituted various controls at all borders posts. Some of these controls consist of the preparation and verification of prescribed documentation and the physical checking of loads passing through such border posts which are said to be exported.

Mrs Oosthuizen testified that in respect of those consignments which were loaded on Regrub's truck at plaintiff's warehouse, she

was responsible for the execution of the relevant actions. Once the order had been prepared, she made arrangements for a customs official to come to plaintiff's warehouse to supervise, with reference to the commercial invoice (where applicable and available), and the DA25 that the goods declared therein were indeed loaded into the truck.

Once the customs official had supervised the loading the truck would be sealed with the official customs seal. Plaintiff and Africa Trading did not have their own seal which some other exporters and transporters affixed to their trucks once they had been loaded.

After loading the truck was taken to the border post. Because it was packed under supervision already, it could be fast-tracked. It could enter the border post through a restricted area immediately. Some reference was made during evidence to the fact that small trucks in the region of three tons were in any event allowed into the restricted area and need not wait like other trucks outside the restricted area until the necessary paperwork had been completed, but nothing much turns on that.

Once the truck, preceded by Mrs Oosthuizen's car in which the customs official was also travelling, reached the restricted area, further documentation must be completed before the goods could be exported. A DA73 requests a physical inspection of the load. This was handed with the DA25 and the invoice to the supervising official and was then given a so-called S number, because the documentation was handed in this fashion to the supervisor.

Where the load has been placed on the truck under supervision,

the physical inspection normally consists of a check of the existing seal. All the documents would be stamped with the appropriate stamps, cross referenced by the numbers allocated thereto. Eventually the load would be allowed to leave for Zimbabwe. There are similar controls on the other side of the border. No evidence of these controls has been lead although the court has had the benefit of a physical inspection of the facilities existing on the other side of the border.

Apart from recording the fictitious consignee at a non existing address, the documents prepared for the relevant consignment of cigarettes appear to be complete and regular on the face thereof. It is common cause that one of the trucks belonging to second defendant transporting such a consignment, was apparently found in the vicinity of a popular garage some distance outside the restricted area in South Africa, after the formalities authorising the export of its load had been completed, with its load still in place.

Inquiries elicited information that allegedly only two trucks carrying Africa Trading's consignment ever reached the Zimbabwe border. Mrs Oosthuizen had only indirect knowledge of these averments, but was generally aware that something untoward had transpired in these transactions with Messrs Muller and Burger.

After some time and after presumably having investigated the matter (this is an assumption), defendant informed the plaintiff by letter that plaintiff was liable in terms of section 19[7] and 44[8] of the Act for excise duties and for payment of a substantial sum in terms of section 87[1] read with section 88 of the Act in lieu of

forfeiture of the cigarettes, which could no longer be found but which would otherwise have been declared forfeit.

At the same time defendant exercised a lien over plaintiff's warehouse and duty free shops at Messina and Beit Bridge, thereby effectively closing down the whole of plaintiff's business. This lead to an application by plaintiff for the release of the impounded goods against appropriate security being furnished. In the interim a settlement was reached by the parties. This settlement covered the aforementioned issues as well as some 400 cartons of cigarettes and cash found by the defendant in Africa Trading's possession, but belonging to plaintiff.

Plaintiff issued summons in 1998 in the first of the two actions which have then been consolidated for purposes of this trial. It claims a declaratory order that it has discharged its duties in terms of section 18[A] of the Act and is thus not indebted to the defendant in respect of excise duties. It seeks a further declarator that it is not obliged to effect any payment in lieu of any forfeiture. At the same time a claim for damages eventually arising from the closure of plaintiff's duty free shops and warehouses was included in this case, which need not be determined now, however, as the parties agreed to request this court in terms of rule 33(4) to seperate the issues. Claim B related to the attachment of the cigarettes and was later postponed as the issue was not yet ripe for hearing.

In 1999 a further action was instituted in which plaintiff claims damages from the defendant if it is held that plaintiff is indeed liable to the defendant for the payment of excise duties. The claim is based

on the alleged failure on the part of the defendant's employees to ensure that the goods did not in fact leave South Africa, thereby allegedly breaching a duty of care toward plaintiff. This issue will still have to be determined if plaintiff is unsuccessful in respect of the declarator that it is not liable for such payment.

At present I am only concerned with an application for absolution from the instance at the end of the plaintiff's case in respect of the first claim, the declarator that the plaintiff has complied with the provisions of section 18[A] of the Act and is therefore not liable for duty.

In support of its claims plaintiff led the evidence of Mrs Oosthuizen, already referred to, who basically described the procedures at Beit Bridge which I have outlined above. I have already alluded to the fact that the Court and the parties conducted on inspection in loco of the customs offices at Beit Bridge and the Zimbabwe border. Plaintiff then closed its case.

Relying upon the provisions of the Act and the rules promulgated thereunder, Mr Dunn SC on behalf of the defendant applied for absolution from the instance. He argued that the plaintiff had adduced no evidence whatsoever that the goods had been taken out of the common customs area at all. In addition, it was virtually common cause that even if the goods had been taken across the border, this had not been bona fide and lawful as the consignee did not exist and its address was a sham. Apart from section 18[A], Mr Dunn SC referred me to the provisions of rule ~~80~~ 18 which put more meat on the skeleton of the provisions of section 18[A].

Regarding the importance of a proper description of the consignee, he also relied upon section 40[1] of the Act and in particular [c] thereof which reads as follows:

"40 Validity of entrance:

[1] No entry shall be valid unless -

[a] in the case of imported or exported goods, the description and particulars of the goods and the marks and particulars of the packages declared in that entry correspond with the description and particulars of the goods and the marks and particulars of the packages as reported in terms of section seven or twelve or in any certificate, permit or other document, by which the importation or exportation of these goods is authorized;

[b] the goods have been properly described in the entry by the denomination and with the characters, tariff heading and item numbers and circumstances according to which they are charged with duty or are admitted under any provision of this Act or are permitted to be imported or exported;

[c] the true value of the goods on which duty is leviable or which is required to be declared under the provisions of this Act and the true terrority of origin, territory of export and means of carriage have been declared...."

He also referred me to section 102[2] and [4] dealing with onus of proof and which reads as follows:

"102. Sellers of goods to produce proof of payment of duty.

[1] .....

[2] In any prosecution or proceedings under this Act, any statement in any record, letter or any other document kept, retained, received or dispatched by or on behalf of any person to the effect of any goods of a particular price, value (including any commission, discount, cost, charge, expense, royalty, freight, tax, drawback, refund, rebate, remission or any other information which relates to such goods and has a bearing on such price or value) or quantity, quality, nature, strength or other characteristic have been manufactured, imported, ordered, supplied, purchased, sold, dealt with or in or held in stock by him at any time, shall be admissible in evidence against him as an admission that he has at that time manufactured, imported, ordered, supplied, purchased, sold, dealt with or in or held in stock goods of that price, value, quantity, quality, nature, strength or other

characteristic. [sic].

[3] .....

[4] 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, the question arises whether the proper duty has been paid or whether any goods or plant have been lawfully used, imported, exported, manufactured, removed or otherwise dealt with or in, or whether any books, accounts, documents, forms or invoices required by rule to be completed and kept, exist or have been duly completed or kept or have been furnished to any officer, it shall be presumed that duty has not been paid or that such goods or plant have not been lawfully used, imported, exported, manufactured, removed or otherwise dealt with or in, or that such books, accounts, documents, forms or invoices do not exist or have not been duly completed and kept and have not been so furnished, as the case may be, unless the contrary is proved."

When he was questioned about the present wording of section 18[A], which was introduced by an Afrikaans amendment, particularly

[2] which reads: "uit die gemeenskaplike doeane gebied geneem is" in the signed version, Mr Dunn SC submitted that this clearly implied that a lawful transfer across the border had to be proved to this court. I must confess that I entertain some doubt about the constitutionality of subsections 102[2] and 102[4]. The issue has not been raised on the pleadings and was not fully debated before me. I believe that I can dispose of the issue, however, without reference to this section.

Mr Van Blerk argued in answer to the defendant's submission that the plaintiff need do no more than show that the documentation which the defendant's employees prepared, indicated that the full procedure required for goods prepared for export had been complied with and that the documentation therefore showed that the goods would, in the ordinary execution of the duties resting upon the customs officials, and the exporters' representatives, have been taken out of the country. This was supported by the defendant's own allegation in the application proceedings prior to the issue of summons that two consignments had in fact reached Zimbabwe, although they had allegedly been taken back to South Africa.

In regard to the recordal in the pre-trial minute that the parties agreed that the consignee was a fictitious entity, he emphasised that this agreement was strictly circumscribed. This is indeed the case and the paragraph reads as follows:

> "9. The Plaintiff was asked to admit that no business called RFA Supplies existed at the relevant time or at all and that no address such as 23 Chilomoni, Blantyre, existed at the relevant time or at all. The Plaintiff responded

thereto as follows:

9.1 The plaintiff does not know nor did it ever know whether or not RFA Supplies existed at the relevant time and whether or not there was an address, 23 Chilomoni, Blantyre exists or existed at the relevant time. [sic]

9.2 The plaintiff's legal representative have been informed by the defendant's legal representatives that they are instructed that RFA Supplies did not exist at the relevant time and there is no such address at 23 Chilomoni, Blantyre. [sic]

9.3 In order to avoid unnecessary evidence the plaintiff will and does admit these facts."

In any event, so the argument ran, plaintiff had adduced enough evidence to constitute a *prima facie* case which should put the defendant upon its defence.

When I questioned Mr Van Blerk about the obvious failure to call any witness from the transport contractor or the actual consignee, Mr Van Blerk contended that this was not necessary in the light of the documents which were in order. In any event, he submitted, the court is not entitled to take into account the absence of witnesses who might best be able to explain the fate of the consignment at the stage when absolution is considered.

I do not agree with this submission. The decision of the full Bench of this division in *Geoghegan v Pestana 1977 [4] SA 31 [T]* a decision of VILJOEN, J. (as he then was) and King, A.J. (as he then

was) is in point. It deals with the granting of absolution from the instance, and whether or not the fact that witnesses which could have been available and evidence which ought to have been available, were neither called or adduced, could be taken into consideration at this stage. The court said the following on page 34-B and further:

> "There are two aspects in establishing of a *prima facie* case calling for an answer. Firstly, the plaintiff must show that he has gone as far as he reasonably can in producing evidence and secondly that the evidence produced is of such a character that if unanswered it would justify a reasonable man in finding for the plaintiff on the matters in issue and on which the onus rested on the plaintiff. *Vide Ex Parte Minister of Justice: In re R v Jacobson and Levy, 1931 A.D. 466, and R. v Mantell, 1959 [1] SA 771 [C].*
>
> The plaintiff could, in my view, reasonably have produced more evidence or at least proved that he had attempted to obtain such evidence. If the defendant was an employer he would have had some records or there would have been some records available such as licences to carry on business, unemployment insurance, levies ... etcetera. A mere inspection of the place of business of the defendant, as appears from exh. G, would have resulted in evidence of the nature of the defendant's business. If it was the growing and supplying of fruit and vegetables this would have been a significant piece of evidence. The plaintiff could also, as argued by Mr Horwitz, have proved the signature on exhs D and E by means of a witness comparing it with the

defendant's signature on his discovery affidavit. The police had the names and addresses of the drivers of all the vehicles involved in the accident. The plaintiff could reasonably have called them in regard to their observations, if any. The driver of the truck could have been subpoenaed to give evidence. There is no evidence that the driver of the truck was not available to give evidence."

The last two sentences applied in particular, *mutatis mutandis,* to the present circumstances.

Although the judgment has been critizised in another respect, the portion which I have quoted from, and especially the last two sentences, which form the ratio of the decision, were not differed from. Apart from the fact that the judgment is binding upon me, I respectfully associate myself with it. The fact that available witnesses were not called and that no attempt was made to explain their absence to this court, allows the argument on absolution that these witnesses would, in the ordinary course of events, have been called. Their unexplained absence allows the inference to be drawn that they would not have helped the plaintiff's case.

In any event, even if I am wrong in this regard, the argument that the documentation in defendant's possession constitutes evidence upon which a court might hold in favour of the plaintiff that the goods were in fact taken out the common customs area, is ill-conceived. The documents go no further than to show that the consignment, addressed to an admittedly fictitious consignee and entrusted to a bunch of smugglers to transport, was prepared by the

lawful exporter. Non constat that the goods in fact left South Africa. The court is not required to artificially close its eyes to the fact that, had there been any kind of documentation in Zimbabwe or in Malawi to support the suggestion that the lawful consignee could be traced, or had a witness been available to show proper delivery of the goods involved, that that evidence would have been produced. Such evidence is indeed required by section 18A(2). The documentation prepared by the defendant on this side of the border does not constitute proof that anything was exported at all, even less is it proof of the fact that anything was lawfully exported. I agree with Mr Dunn SC's submission in this respect, that "wel" must be read as "lawfully taken across the border".

The absence of such evidence is not explained. Common sense indicates that it does not exist. Plaintiff has consequently failed to bring any evidence to prove the essential fact which it must establish to succeed. There is nothing before this court upon which a finding on this issue might be made in Plaintiff's favour, even if the defendant were to be put upon its defence.

Consequently the application for absolution must succeed. Such an order is made and in accordance with the parties' request, no order as to costs is made at this stage.

◄◄◄◄O►►►►