

IN THE HIGH COURT OF SOUTH AFRICA
WITWATERSRAND LOCAL DIVISION

Case No. 97/34462

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: YES /NO.	
(2) OF INTEREST TO OTHER JUDGES: YES /NO	
(3) REVISED. ✓	
18/03/2002 DATE	<i>Plaasse</i> SIGNATURE

TATA INDUSTRIAL CORPORATION (SA)
(PTY) LTD

PLAINTIFF

and

THE MINISTER OF FINANCE

FIRST DEFENDANT

THE CONTROLLER OF CUSTOMS & EXCISE

SECOND DEFENDANT

JUDGMENT

CLAASSEN J

Plaintiff sues the defendants *in delict* for damages allegedly suffered as a result of the sale by the second defendant of certain goods which were allegedly imported by the plaintiff. The first defendant is sued in his capacity as the designated minister for the administration of the Customs and Excise Act No. 81 of 1964. The second defendant is the Controller for Customs and Excise, operating from Frazer Street, Johannesburg.

Plaintiff alleges that during December 1994 it caused two containers of vinyl tiles to be ordered from Tata Exports Ltd., a company based in India, for shipment to South Africa. The goods were loaded into containers bearing Nos. EISU 3303187 and EISU 3451287

and shipped on the *Manaslu* vessel to the Republic. Payment was to be made by the plaintiff on open account, 150 days from the date of the Bill of Lading and, according to the invoices (see Exhibit "A" pages 1 and 3), the cost insurance freight (CIF) values of the goods were US \$ 27 317,00 i.e. R99 652,42 and US \$ 23 708,00 i.e. R86 486,78 respectively. The goods subsequently arrived at Durban harbour on the 15th of April 1995 and were thereafter transported to the South African Container Depot at City Deep, Johannesburg where clearance for home consumption in terms of the Customs and Excise Act, occurred on the 27th of July 1995 for entry into the bonded warehouse of Linfreight Management Services under cover of Bills of Entry Nos 32137 and 32139 after the plaintiff's clearing agent (M&F Shipping) presented all the necessary documents. M&F Shipping eventually established during August 1995 that the goods were in fact in the State Warehouse, Kazerne under the control of the second defendant. Mr Jabbhai of M&F Shipping met with Mr Jooste, an Assistant Director in the office of the second defendant during the 2nd or 3rd week of August 1995 to obtain release of the goods. Due to the unavailability of personnel at the office of the second defendant, the first meeting between the plaintiff and Mr Jooste could only be held during January or February 1996. Plaintiff expressed concern about the rent payable to the State Warehouse, whereupon Jooste indicated that he would make representations to the second defendant's head office in Pretoria for the remission of such rent. During the ensuing months the plaintiff attended at least another six meetings with Jooste and during September/October 1996 plaintiff was informed that it would take one more month for the matter to be resolved. During February 1997 plaintiff established that the State Warehouse had sold the goods during September 1996 on a public auction without notification to the plaintiff or its clearing agent or the other interested party indicated on the Bill of Lading.

Plaintiff alleges that the second defendant was negligent in allowing the goods to be sold by public auction without proper notice to the plaintiff and/or its agent and/or the other interested party whilst the second defendant knew of the plaintiff's vested interest in the

goods. The second defendant allegedly failed to apply the same care that a *diligens pater familias* in such position would have applied in that:

- “1. It did not foresee the reasonable possibility that in causing the goods to be sold on public auction would injure the plaintiff in its property, causing it patrimonial loss;
1. The *diligens pater familias* in the same position of the Second Defendant would have taken reasonable steps to ensure that the plaintiff did not suffer patrimonial loss through the sale of the goods by public auction by giving:
 - 2.1. proper notice of the intended sale; and/or
 - 2.2. the plaintiff opportunity to remedy the situation.
3. The second defendant failed to give notice of its intention to sell the goods by public auction to the plaintiff and/or its agent and/or the other interested party whilst it knew of the plaintiff's attempts to release the goods and its vested interest therein.”

As a result, plaintiff claims damages in the following respects:

“Loss in respect of CIF free on board value of the goods	R186 140-08
Loss in respect of clearing and port charges	25 000-00
Loss in respect of profit on the goods	46 535-02
Loss in respect of interest on the amount paid for the goods at the rate of 15,75% from the date of payment, i.e. 3 October 1995 to the date of claim	58 634-12
TOTAL	R316 309-22”

The second defendant filed a special plea of prescription but did not argue or proceed therewith. Nothing further need be said about it. Defendants' main defence to plaintiff's claim is pleaded in par. 9 of their plea as follows:

- “9.1. The importer of the goods failed to make due entry of the goods within 7 days from the date of importation as prescribed by section 38(1) of the Act;
- 9.2. The goods remained unentered in contravention of the Act and were removed to the State Warehouse, Kazeme on 13 July 1995;

- 9.3. The goods were entered (cleared) on 27 July 1995;
- 9.4. The importer of the goods failed to present a release order to the second defendant at the State Warehouse, Kazerne, as prescribed by section 38(2) of the Act.
- 9.5. The goods were consequently sold on public auction in accordance with the provisions of the Act.
- 9.6. In the alternative to paragraph 9.2 - 9.5 above the defendants plead that the plaintiff failed to furnish proof that freight and other charges and rent due in respect of the goods had been paid and the goods were consequently sold on public auction in accordance with the provisions of the Act."

Defendants further allege that the two containers contained boxes marked "Wonderful Tiles". Defendant admitted that representations ostensibly on behalf of the importer were made to Jooste and that such persons were informed during or about August 1996 that the Commissioner had determined the full amount of state warehouse rental was payable by the importer. It is further admitted that the sale of goods by public auction took place on the 4th of September 1996 after prior notice was given by publication in accordance with the provisions of the Act to such interested parties as were within the knowledge of the second defendant. Notices were given by the second defendant to Wonder Flooring as would appear from the indexed bundle of documents, Exhibit "A", pages 20 and 21. The defendants further specifically pleaded that the plaintiff acknowledged that the goods were to be sold on the public auction. It is denied that the plaintiff suffered any loss or damage.

Defendant instituted an action for the recovery of the state warehouse rent in the amount of R185 280 under Case No. 98/14108. By order of Court this action was consolidated with the plaintiff's action. To prevent confusion I will continue to refer to the parties as "Plaintiff" and "Defendant" as they are named in plaintiff's action in Case No 34462/97 and regard the claim in Case No 98/14108 as a counterclaim. At the end of the evidence, counsel for the plaintiff conceded that defendant was entitled to its full counterclaim as

pleaded in its particulars of claim under Case No. 98/14108. Therefore, nothing more need be said in regard thereto.

The plaintiff called two witnesses, Mr. S. Pandya, who became the General Manager of the plaintiff during April 1996 and Mr Jabbhai, who was the sole owner of M & F Shipping and Clearing Agents. Pandya was unable to testify from personal knowledge as to the negotiations between M & F Shipping and Mr. Jooste and/or other officers of the second defendant during the relevant period between April 1995 and April 1996. Thereafter plaintiff closed its case.

For the Defendant, Mr Jooste and Mr F Williams, testified in their capacities as employees of the second defendant during the relevant period. Thereafter the defendants closed their case.

In order to succeed plaintiff has to prove that it had legal title and/or an interest in and to the goods that were sold by the second defendant and that such sale was affected negligently. Let me say immediately that the case pleaded by the plaintiff in its particulars of claim is substantially different from the case which eventually appeared from the evidence led at the trial. However, the crux of plaintiff's claim is that while the plaintiff was making representations to the Department of Customs and Excise through Jooste, the goods were sold by public auction without notice to the plaintiff while the second defendant had knowledge of the plaintiff's rights and interests therein.

In my view, plaintiff faced a number of insurmountable obstacles in the proof of its claim.

1. Plaintiff's right, title and interest in and to the goods.

There is no evidence that plaintiff ever became the owner of the goods in question. It is common cause that the Bill of Lading had two interested parties mentioned therein, namely the plaintiff as well as M/Afrique Distributors (Pty) Ltd. The evidence of Jabbhai was that the Bill of Lading was endorsed in blank on its reverse side, which in effect made it a bearer document. Mr Tanna of Afrique Distributors was in possession of these documents and instructed Jabbhai of M&F Shipping to obtain the release of the goods. Neither Jabbhai nor Pandya was able to say exactly what the relationship was between the plaintiff and Afrique Distributors and who was actually entitled to possession of the Bill of Lading. Jabbhai was also not sure who was going to pay his bill for services rendered as clearing agent. What is more, he admitted that to date he had not been paid at all. To confuse the picture further, Plaintiff's papers indicate that Tata Exports Limited, Dehli, India, instituted a claim for the loss of the goods. Exhibit "A" page 46 is a copy of a letter dated the 18th of March, 1997 written on the letterhead of plaintiff's attorneys of record, which was addressed to the second defendant on behalf of the aforesaid Indian exporting company. It reads as follows:

Re: Tata Industrial Corporation - Container No. EISU 33038187 and EISU 3451287.

We have been instructed to address this letter to you at the instance of **Tata Exports Ltd. Dehli, India.**

Our client advises us that it consigned the above two containers to Tata Industrial Corporation in South Africa. The containers were cleared on 27th July, 1995 under Bill of Entry Nos. 32139 and 32137. **For reasons unknown to our client, the containers were placed in the States Warehouse and sold without knowledge to our client.**" (Emphasis added)

From the above letter it would seem as if the exporters still had full right, title and interest to the goods and not the plaintiff. The plaintiff's witnesses were unable to clear up these contradictory aspects in regard to the person correctly entitled to the goods. A

very confused picture was presented by the plaintiff which, in my view, did not establish on a balance of probabilities its right, title and interest to the goods in question.

2. Payment for the goods.

In par. 7 of plaintiff's particulars of claim it is alleged that "payment were(sic) to be made by the plaintiff on open account, 150 days from the date of Bill of Lading". There is no evidence that plaintiff actually paid these amounts. Both Pandya and Jabbhai sought to infer from a stamp entitled, "FULLY UTILISED", appearing on the Bill of Entry in respect of the two containers (see Exhibit "A" pages 8 and 12), that payment had been affected by the plaintiff's bank. Under cross-examination both had to admit that they were not aware of the underlying transactions giving rise to the aforesaid stamp being placed on the documents. No official from the bank was called to establish that the amounts stated in the aforesaid documents as the price of the goods were actually debited against the plaintiff's bank account. Plaintiff's bank accounts were not presented in evidence to indicate that such funds were transferred from plaintiff's bank account to the exporter. I agree with Mr Peter, acting on behalf of the defendants, that the evidence of Pandya and Jabbhai in this regard constitutes inadmissible hearsay regarding facts which were not within their knowledge. In the light of the aforesaid unsatisfactory evidence, I am of the view that the plaintiff failed to prove that it had paid for the goods and as such it could not have suffered any damages.

3. Proof of loss and/or damages suffered.

In the event of my aforesaid conclusions being wrong, it is necessary to investigate whether plaintiff proved any loss or damages. On the assumption that plaintiff was the rightful owner and had paid for the goods, the question arises what damages the plaintiff actually proved. At best plaintiff's damages would have been confined to the loss of profit on the goods. Such loss of profit would be calculated by the difference between

the market value of the goods, if sold on the open market, and the cost thereof to the Plaintiff. No evidence whatsoever was placed before me as to the market value of the goods. It was proved beyond any doubt by Williams that the goods were damaged when it arrived in the State Warehouse. He confirmed that he inspected the goods and that some of the cartons were squashed and damaged. See in this regard the notes made on the Cargo Release Advices, Exhibit "A" pages 16 and 17. Such damage to the goods would necessarily have diminished the market value thereof. No evidence was tendered regarding such diminution in value. The amounts appearing on the exporter's invoices, Exhibit "A" pages 1 and 2, do not establish the market value of the goods as at the date of delict. Nor does it indicate what portion thereof constituted the plaintiff's profit, if indeed the goods had been sold for that price. In addition, there was evidence to the effect that the price on the invoices was subject to doubt. Jabbhai testified that he was expressly instructed not to clear the goods due to a dispute regarding the price of the goods appearing on the invoices. The fact that the goods were sold for R53 000 (see par. 6.4 of the Pre-Trial Minute dated 6th of February 2002, Exhibit "B") is equally no indication of what the plaintiff's loss of profit would have been. Plaintiff's claim in delict must be calculated in accordance with the plaintiff's loss of patrimony. There is a total dearth of evidence to establish this fact. Furthermore the plaintiff has lost sight of the fact that in order to realize the market value of the goods, plaintiff would have been required to pay the import duty, VAT and state warehouse rent for the goods to be released. It is common cause that the duty under tariff code 3918.10.35 was R48 850-80 (see par. 6.2 of Exhibit "B"). It is also common cause that the VAT calculated in accordance with section 23(2)(a) of the VAT Act of 1991 amounted to R31 915-86 (see par. 6.3 of Exhibit "B"). Accordingly the loss of patrimony would be the difference between the market value of the goods and the sum of the duty, VAT and state warehouse rent (which admittedly is the amount of R185 280-00 plus interest at 15,5% *a tempora morae* from 10th of June 1998 to date), all of which the plaintiff still had to pay. The sum of the duty, VAT and state warehouse rent far exceeded the price realized by the sale of the goods at the auction. In these circumstances I can come to no other conclusion

other than to find that the plaintiff failed dismally in its attempt to prove any loss of patrimony in any amount whatsoever.

In view of plaintiff's failure to scale the aforesaid hurdles it is, in my view, strictly speaking unnecessary to enter into the debate whether or not plaintiff succeeded in proving any negligence on the part of the defendants. For the sake of completeness however, I would briefly state my views in regard thereto.

4. Negligence

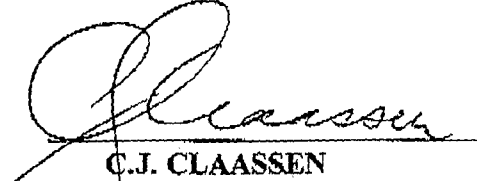
Plaintiff's attempt to prove negligence on the part of the second defendant did not even get off the ground. Jooste and Williams who testified on behalf of the defendants, were excellent witnesses. It is paramountly clear from their evidence that the second defendant had no knowledge of plaintiff's alleged interest in the goods. It is common cause that the goods arrived at the state warehouse with no marks of identification and with the Bill of Lading unknown to the second defendant. As such there was no way for the second defendant to trace the plaintiff as an interested party. Williams, acting on behalf of the second defendant, went out of his way to establish the identity of interested parties by physically examining the goods. In so doing he established that Wonder Floors' name appeared on the cartons amongst the cargo in the containers. It is for that reason that notices were sent to Wonder Floors. I also find on the probabilities that defendants succeeded in proving knowledge on the part of the plaintiff's clearing agent, M&F Shipping, of the fact that the goods were in the state warehouse and subject to being sold by public auction. Notices of the intended public auction were placed in all the boxes of all clearing agents operating as such at Customs House, including that of M&F Shipping. The auction lists contained the "SG" and "EISU" numbers of the shipments. (See page 55 of Exhibit "A".) Adequate advertisements were also placed in English and Afrikaans newspapers distributed in the Johannesburg area. I accept the evidence of Jooste and Williams as truthful that M&F Shipping would have received the notices and auction

lists, two weeks prior to the 4th of September 1996. Jabbhai's denial that he received the lists is rejected as blatantly untruthful. Williams contradicted this by stating categorically that he and his assistant placed these lists in Jabbhai's box. Jabbhai admitted that in the ordinary course sales lists of state warehouse auctions were routinely placed in his box. He further testified that had he looked through the list he would have detected the fact that the goods, identified by the ISEU numbers, were his client's goods in question and that they were about to be sold by public auction. Jabbhai's failure to act on such knowledge is the true cause of any perceived loss suffered by Plaintiff. In my view, plaintiff failed to discharge the onus of proving any negligence on the part of either of the defendants and/or any of its officers. In the premises plaintiff's claim should be dismissed with costs.

I therefore make the following order:

1. Plaintiff's claim is dismissed with costs.
2. Defendants' counterclaim is granted and plaintiff is ordered to pay the defendants the sum of R185 280-00 together with interest thereon at the rate of 15,5% as from 10th of June 1998 to date of payment and costs.

DATED AND SIGNED AT JOHANNESBURG ON THIS 18th DAY OF MARCH 2002.


C.J. CLAASSEN
JUDGE OF THE HIGH COURT

Advocate for the Plaintiff: Miss A Stunke
Attorney for the Plaintiff: James Human Attorneys

Advocate for the defendant: Mr J.R. Peter
Attorney for the defendants: The State Attorneys