

**Gam Plastics (Private) Limited
Versus
Speed Link Cargo (Private) Limited**

HIGH COURT OF ZIMBABWE
CHITAKUNYE J
HARARE, 13 JUNE 2007

Civil Trial

C Nhemwa, for the plaintiff
A Mugandiwa, for the defendant

CHITAKUNYE J: The plaintiff sued the defendant claiming \$4 777 070 388-00 (old currency) for loss of profits suffered by the plaintiff with interest at the prescribed rate from the date of summons to date of final payment. The defendant denied liability for any loss the plaintiff may have suffered as alleged in the plaintiff's summons and declaration.

The parties filed a statement of agreed facts and requested that the matter be dealt with as a stated case.

The basic facts are that the plaintiff, Gam Plastics (Private) Limited purchased a pneumatic punching machine from Queens Machinery Company Limited, a Taiwanese Company operating from Taipei, Taiwan, on a "cost/insurance/freight" contract (C.I.F). The plaintiff duly paid for the machine and received a bill of lading. The carrier of the machinery was DSL Star Express incorporated. The freight agent of the carrier was Maersk Logistics South Africa.

The defendant, Speedlink Cargo (Private) Limited, was contracted by Edward John Shipping, South Africa (who had been contracted by Maersk Logistics South Africa) to facilitate the release of the machine in Harare. When the machine arrived in Harare, the plaintiff demanded the release of same from the defendant. The defendant refused to release the machinery on the basis that it had been directed by its principal not to release the goods until the seller of the goods had settled an amount that was owed by it to Maersk Logistics South Africa in respect of storage and handling charges incurred in South Africa.

The plaintiff took the position that the defendant had an obligation to release the machinery as per its interpretation of the bill of lading. The defendant on the other hand took the position that it had no such obligation and would only release the machinery upon instructions from its principal to do so.

The plaintiff filed an application in the High Court for the release of the machinery in which it cited Maersk Logistics South Africa and the defendant as respondents (case number HC 6442/05).

The matter was settled out of court and the machinery was released on 24 February 2006. The applicant then withdrew the application.

The plaintiff later commenced the present law suit against the defendant only.

The issues as determined at the pre-trial conference included:

1. whether or not the plaintiff's summons and declaration discloses a cause of action against the defendant;
2. whether or not the defendant had any legal obligations to release the goods purchased by the plaintiff before the seller of the goods had met all costs, charges and expenses incidental to the shipping and delivery of the goods to Harare;
3. whether or not the plaintiff suffered any loss of profits and if so, the quantum of the lost profit; and
4. whether or not the defendant is liable for any such loss of profit.

In their heads of argument and submissions counsel for the parties argued vigorously on basically two legal issues, that is issues 1 and 2.

On the first issue the plaintiff argued that its summons and declaration clearly discloses a cause of action. There is a nexus between the defendant's illegal action of detaining the machine and the loss suffered by the plaintiff. The declaration sets out all the particulars required to set out defendant's delictual liability. The plaintiff could, unfortunately, not point out what it is in the summons and declaration that clearly shows the cause of action as disputed by the defendant. The defendant on the other hand argued that the three paragraphs 3 to 5 of the plaintiff's declaration which purportedly set out its cause of action, do not in fact disclose a cause of action against the defendant. The three paragraphs read:

- "3. The plaintiff purchased a pneumatic punching machine from Taiwan C.I.F, Harare Zimbabwe. The machine was transferred to Harare through the defendant who despite the fact that the contract was C.I.F. refused to release the pneumatic punching machine to the plaintiff.
4. The defendant had no legal basis to refuse to release the pneumatic punching machine.
5. The plaintiff lost a net profit of \$4 777 070 358-00 as a result of the defendant's illegal action because she was not able to double the

production of certain products that required the use of pneumatic machine from 1 September 2005 to 24 February 2006”.

The defendant contended that the above shows that the plaintiff pleaded a claim against the defendant in contract and not delictual. The claim being that the defendant had an obligation to deliver the machine to the plaintiff in Harare as per the C.I.F. contract and failed to do so. The breach then resulted in the plaintiff suffering damages.

The defendant’s counsel argued that a claim in contract cannot succeed against the defendant as there is no privity of contract between the plaintiff and the defendant. The parties to the C.I.F. contract were as per the bill of lading –

1. Queens Machinery Company Limited, the supplier of the goods;
2. Gam Plastics (Private) Limited, the Zimbabwe purchaser of the goods;
3. DSL Star Express incorporated, the carrier of the goods; and
4. Maersk Logistics South Africa, the freight agent of the carrier

Maersk Logistics South Africa subcontracted Edward John Shipping South Africa who in turn subcontracted the defendant to facilitate the release of the goods in Harare.

The defendant argued that a subcontractor such as the defendant cannot sue or be sued by the party (plaintiff) with whom the main contractor has contracted.

Whether the summons and declaration disclose a cause of action has to be discerned from these documents. A cause of action may be defined as a fact or combination of facts which give rise to a right of action. In this case it is common cause that the defendant’s involvement was that it was a subcontractor for the purpose of facilitating the release of the machine in Harare. It derived its mandate from its principal.

In that regard the defendant said that it was acting under the instructions of its principal not to authorise the release of the machine as the supplier had not made certain payments. The defendant had no direct contractual obligations to the plaintiff.

The argument by the plaintiff that its claim is in delict seems contrary to its declaration. The declaration clearly refers to an obligation arising from a C.I.F. contract. It is in terms of the C.I.F. contract that the plaintiff claimed that the defendant is obliged to authorise the release of the machine.

It is in apparent realization of difficulties in the nature of its claim that the plaintiff’s legal practitioner’s submissions were now more on the ownership rights it enjoyed from the C.I.F contract and the fact that an owner has the right to vindicate his property against the whole world. Surely there was never any dispute as to who became owner of the machine.

As noted by the defendant, the plaintiff's claim when carefully analysed is neither for the return of the machine nor for the fruits that accrued to the defendant or their value as at the date of trial; so no vindication is in fact being sought.

The plaintiff's claim is for the recovery of what is termed patrimonial loss, in this case a purely economic loss arising from the defendant's alleged refusal to release the goods upon demand by the plaintiff.

In this case the plaintiff said that he made a demand on 5 November 2005 yet from its papers loss is being calculated from 1 September 2005. If at all there was any refusal by the defendant it could only have been after demand.

In any case in as far as it is agreed that the machine was to be delivered in terms of the C.I.F. contract, it is only logical that the provisions of that contract be relied upon.

The defendant's dealing with the machine arose from it being appointed a subcontractor of the carrier's agent. Thus the defendant could have no greater power or rights over the machine than the carrier. In this regard the defendant pointed to a number of clauses in the bill of lading that had a bearing on the relationship between the plaintiff and the defendant and the circumstances of the release of the machine. This pertained mostly to the second issue.

The plaintiff argued that the defendant had an obligation to release the machine to the plaintiff in his capacity as owner.

The case cited by the plaintiff of *Chattanooga Tufters Company Cheville Corp of SA 1974 (2) SA 10* at p 15 B-E shows that whilst in a CIF contract, there are certain customs or practices such may be varied in certain instances. See p 15 B-E where CLOETE J said:

"The contract being a C.I.F. contract, there are by mercantile custom certain essential features which may be varied in accordance with the actual agreement of the parties... . The ordinary obligations of the seller are -

- (1) to ship to the agreed port of shipment the goods ordered;
- (2) to procure a contract of affreightment for delivery of the goods at the agreed destination (which includes the bill of lading evidencing the contract;
- (3) to arrange insurance current in the trade;
- (4) to invoice goods to the purchaser debiting him with the agreed price and costs of insurance and freight; and
- (5) to tender to the purchaser documents in a valid and effective condition".

In *casu* the parties who are privy to the contract agreed to certain terms as contained in the bill of lading.

Some of the clauses relevant to the issue at hand states that:

- "8.1. The carrier does not undertake that the goods or any documents relating thereto shall arrive or be available at any point or place at any stage during the carriage or at the port of discharge or place of delivery at any particular time or to meet any particular requirement of any licence, permission, sale contract, or credit of the merchant or any market or use of the goods and the carrier shall under no circumstances whatsoever and howsoever arising be liable for any direct, indirect or consequential loss or damage caused by delay. If the carrier should nevertheless be held legally liable for any such direct or indirect or consequential loss or damage caused by such alleged delay such liability shall in no event exceed the freight paid for the carriage.
- 8.2. Save as is otherwise provided herein, the carrier shall under no circumstances be liable for the direct or indirect or consequential loss or damage arising from any other cause whatsoever or for loss of profits".

The bill of lading thus specifically excluded delays on delivery as a cause of action for any damages against the carrier. No specific time was fixed for delivering failure of which the carrier or its agents would be liable for damages.

The defendant as a sub agent of the carrier's agent cannot surely be burdened with that which the ultimate principal could not be burdened with in terms of the contract. Unless the plaintiff can allege any wrongful or unlawful conduct of the defendant outside the conduct protected by the bill of lading or outside the carrier's mandate.

Further clause 17 of the bill of lading provides for the carrier to have a *lien* on goods. It states that:

- "17. The carrier shall have a lien on the goods and any documents relating thereto for all sums payable to the carrier under this contract and for general average contributions to whomsoever due. The carrier shall also have a lien against the merchant on the goods and any documents relating thereto for all sums due from him to the carrier under any other contract. The carrier may exercise his lien at any time and any place in his sole discretion, whether the contractual carriage is completed or not in any event any lien shall extend to cover the cost of recovering any sums due and for that purpose the carrier shall have the right to sell the goods by public auction or private treaty, without notice to the merchant. The carrier's lien shall survive delivery of the goods".

By virtue of the above it may be said that the carrier and its agents were within their rights to withhold the authorization for release of the goods until the seller had paid all the sums due.

The plaintiff admitted that the reason given by the defendant for not authorising the release of the machine was on the instructions of the defendant's principal. That instruction was based on non-payment by the seller of certain charges lawfully due. This was within the principal's power as per the bill of lading.

The plaintiff's assertion that the defendant had no legal basis to refuse to release the pneumatic machine is oblivious of the terms and conditions in the bill of lading.

The plaintiff alluded to the fact that in an earlier case (HC 6442/05) in which applicant had cited the defendant and Maersk Logistics South Africa as the respondents, the defendant had not opposed the application. The plaintiff went on to interpret the failure to oppose and the offer of a settlement as an admission by the defendant that they had no legal basis to withhold the machine. Unfortunately that is not always the case.

The defendant in its plea indicated that the settlement was more out of the need to cut on costs. In any case that settlement involved its principal as the defendant had acted in accordance with the principal's instructions.

In the present case, with the full knowledge that the refusal to authorise the release of the machine was at the instructions of defendant's principal, the plaintiff chose not to cite the principal but the sub agent only.

I am of the view that the plaintiff has not made out a cause of action against the defendant.

On the second issue I find that the defendant had no legal obligation to authorise the release of the machine purchased by the plaintiff before the seller of the machine had paid all the costs, charges and expenses incidental to the shipping and delivery of the machine to Harare. The bill of lading granted the carrier a lien over the goods in *lieu* of sums due.

On the basis of the above legal issues, I hereby dismiss the plaintiff's claim with costs.

C.Nhemwa & Associates, plaintiff's legal practitioners.

Wintertons, defendant's legal practitioners.