



**HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK
JUDGMENT**

In the matter between:

Case no: I 2422/2013

BENSON GRAIG (PTY) LTD

PLAINTIFF

And

THE MINISTER OF FINANCE

1ST DEFENDANT

THE COMMISSIONER OF CUSTOMS AND EXERCISE

2ND DEFENDANT

Neutral citation: *Benson Graig (Pty) Ltd v The Minister of Finance (I 2422/2013)*
[2016] NAHCMD 22 (12 February 2015)

Coram: MILLER AJ

Heard: 10-14 August 2015

Delivered: 12 February 2016

Flynote: Contract – Importation of Consignment of cigarettes in terms of the Customs and Excise Act, Act 20 of 1998 – the Importer has an obligation to provide the correct information indicating the purpose of the Consignment – Discrepancies in the documentation presented led to confiscation of the consignment and imposition of 25% penalty- Court holding that the imposition has no statutory basis, such seizure unlawful.

ORDER

Judgment is made in favour of the plaintiff as against the defendants, jointly and severally, the one paying the other to be absolved, in the amount of:

1. BWP928 000.00 or the Namibian equivalent thereof;
2. Costs, such costs to include the costs of one instructing and two instructed counsel
3. The plaintiff is liable to the defendants for the costs in respect of the application for absolution granted on 12 August 2015, which shall include the costs of one instructing and one instructed counsel.

JUDGMENT

MILLER AJ: [1] The plaintiff is a company registered in accordance with the company laws of Botswana and carries on business as a cigarette manufacturer. On 13 February 2013, a consignment containing 579 boxes of cigarettes valued at BWP928, 000.00, destined for a bonded warehouse belonging to the Southern African Duty Free Namibian in Oshikango, was detained by the officials of the defendants at the Rundu border post. The Regional Head of Customs and Excise refused to release the consignment until a penalty of 25% of the excise duty, which was in excess of N\$ 800 000.00, was paid. The plaintiff claims damages as a result of the unlawful and wrongful detention of the consignment to the value of the consignment or the return thereof or the Namibian dollar equivalent thereof, plus N\$ 30 000.00 being the transport costs of forwarding a replacement consignment to Southern African Duty Free Namibian as well as interest on any amounts payable at the rate of 20% *a tempore morae*.

The pleadings

[2] The plaintiff's case is that it entered into a Costs & Freight sale with the Southern African Duty Free Namibian (Pty) Ltd and payment of the consignment was to be done

on delivery at its premises in Oshikango. Southern African Duty Free Namibian (Pty) Ltd is accordingly the importer who used the services of PR General Dealers CC as the clearing agents for the cigarettes. The plaintiff however alleges that it is the owner of the consignment presumably until the purchase price is paid. The plaintiff claims that the value of the cigarettes must have deteriorated over a period of time due to factors such as temperature and humidity and ought to have been protected from insects and rodents.

[3] The defendants admit that there was a consignment received at the Muhebo border post forwarded by the plaintiff on 13 February 2013 which was then subjected to customs and excise clearance procedures. It is further not disputed that the goods were destined for Southern African Duty Free Namibian (Pty) Ltd, which is a registered bonded warehouse situated in Oshikango. The defendant however disputes whether the goods were sold to Southern African Duty Free Namibian (Pty) Ltd as no documentary proof was given by the driver and representative of the plaintiff.

[4] As regards the confiscation and the penalty to be paid, the defendants' admits that the goods were seized but contends such seizure is not wrongful neither unlawful as it was done in terms of the law and for the following reasons:

- a) That the importer or representatives of the plaintiff made a wrong declaration that would have resulted in the plaintiff or Southern African Duty Free Namibian (Pty) Ltd paying less custom duties than they were lawfully supposed to. The SAD 500 IM4 C230 that was presented by the truck driver intimated that the cigarettes were being imported for consumption in the common customs area (SACU) and in terms of the Customs and Excise Act, 20 of 1998 ('Act');
- b) The plaintiff became aware of the misrepresentation by the representative and attempted to correct the declaration by presenting the SAD 500 IM8 which is the correct declaration and withdrew the false declaration that was initially presented. The aforesaid attempted ratification then attracted lawful monetary penalty in the region as pleaded by the plaintiff. The plaintiff refused to pay such penalty upon demand by the Namibian authorities, hence the

detention of the cigarettes. The defendants plead that the cigarettes were thus lawfully seized and can only be released upon payment of the penalty.

[5] The defendants are adamant that the goods will only be released once the penalty has been paid by the plaintiff and that the actions of the customs and excise officials were not wrongful or unlawful, they acted within the course and scope of their employment and in terms of s 4(18) of the Act and that the plaintiff is thus not entitled to any damages as claimed. The court may accordingly not order the release of the goods until the penalty is paid by the plaintiff and that if the deterioration of the goods is an issue, the plaintiff must pay the penalty if it desires the release of the seized goods. Accordingly, the action must be dismissed with costs.

[6] In replication, the plaintiff denies the allegations by the defendants save to admit that the clearing agents initially made a wrong declaration in that an IM4 declaration was made necessitating the payment of applicable duties since the goods were wrongly indicated that they were intended for resale within Namibia. Subsequently, an IM8 declaration was filled in and a voucher of correction was presented to the customs officials to exclude the payment of the applicable duties since the goods were not for resale in Namibia. Accordingly, a notice of detention, without any grounds was presented to the plaintiff. It is therefore the plaintiff's case that no reason were given by customs official when the consignment was confiscated and alleges that the 25% penalty would have been applicable had the consignment been imported to Namibia for sale or resale.

Issues that calls for determination by the court

[7] The parties' joint pre-trial report dated 15 January 2015 clearly sets out both factual and legal issues that need to be resolved by this court. I will not repeat all of them save to say that it boils down to whether the plaintiff has made out a case for the relief sought against the defendants, since it is the plaintiff that bears the onus to amongst others prove that it is entitled to the payment of the value of the cigarettes without paying the customs and excise. The defendants also bear the onus of proving that the officials acted *bona fide* and that the plaintiff is liable to pay the customs and

excise. That can be established from the evidence presented on behalf of both parties. The first claim, as regards the return of the boxes and the transport consignment costs is no longer persisted with.

Evidence on behalf of the plaintiff

[8] One of the plaintiff's directors, Nelson Nonguiera, testified to the effect that he bears personal knowledge about the invoice and the underlying sale to Southern African Duty Free Namibian (Pty) Ltd for various brands of cigarettes to the value of BWP928 000. Accordingly, with the help of in-house clearing agents, the cargo was cleared to departure from Botswana and the same documents, ie the invoice and the clearing documents were presented by the truck driver to the clearing agents at the Namibian border post. Accordingly, the plaintiff would then be informed of the amount of duties or guarantees required to be paid. No such information was received from the clearing agents until on the 14 February when the plaintiff learned that the clearing agents filled in a wrong customs declaration form, IM4 for local consumption, and that the cargo would for this reason be detained until payment of 25% of the excise duty on the goods. The witness admitted that the clearing agents ought to have filled in IM8 for goods in transit. The witness confirms that a 'Customs and Excise Cancellation of registered declaration' or Voucher of correction was filled in by the agents and presented to the officials of the defendant. However and despite all the efforts to have the cargo released, the defendants retained the cargo in the warehouse.

[9] Throughout his evidence, the plaintiff's case has been sustained, ie, there was a mistake made but that there is a procedure available to correct such mistake. Allegations of unlawful acts or deceitful intentions were thus denied and in amplification of his case, stated that although the documents presented did not contain sufficient information to enable the customs officials to determine the status of the cargo, all the relevant information was presented. At no time did the witness deny that customs and excise would be due on consignment of the cargo to Namibia, what he maintains is however that had the IM8 being accepted, no duties are payable by the plaintiff for

cargo in transit going to a bonded warehouse and thus brings no implication to the Namibian government. Procedurally, Southern African Duty Free Namibian (Pty) Ltd would be the entity to pay for any customs and excise. Since the cargo is destined for a bonded warehouse, such funds would come from the bond held for the plaintiff over the consignment in the amount of N\$ 1,6 million dollars. Accordingly, all that the defendants would have done is accordingly accept the Voucher and determined how much the customs and excise would be to be paid by way of letter of bond from the Southern African Duty Free Namibian (Pty) Ltd.

[10] The truck driver, one Sakaria Moongo confirmed the evidence as regards the presentation of the invoice and a declaration to the clearing agents. He further testified that no problems were experienced at the Botswana border and the same documents were presented to the clearing agent who took the process further to clear the freight at the Namibian border. Accordingly, the clearing agent gave back the documents stamped and was told that everything is fine. The driver was therefore allowed to proceed to Rundu where he was intersected by the Namibian police and taken to the Rundu Customs and excise office. Thereafter the goods were offloaded and stored in a warehouse. The only explanation that the truck driver had was that there was a problem with the papers presented by the clearing agent. The witness returned home after three days. He maintained his version during cross examination.

[11] The plaintiff claims the return of the 579 boxes or the value thereof. A cigarette expert testified that the shelf life of cigarettes once packed, wrapped and sealed is six months and since the goods have been exposed to heat for over a year, his inspections revealed that the cigarettes are now dry, lost moisture, changed in taste and inhaling becomes irritating and not smooth. Accordingly, the cigarettes are already taken off the market and cannot be sold as this will lead to reputational damage and loss of custom. Accordingly, these cigarettes are worthless and cannot be recycled by the plaintiff or anyone for that matter.

[12] In light of the evidence by the expert, the plaintiff abandoned the relief for the return of the cigarettes and absolution was accordingly granted in that respect. The defendants were further absolved from answering the claim as regards the N\$ 30 000

for forwarding a replacement consignment as same is not persisted with. The court however found that there is sufficient evidence that establishes the market value of the consignment as being BWP928, 000.00 and puts the defendants to their defence in this regard. The defendants must therefore prove beyond probabilities that the plaintiff did not establish the damages claimed.

Evidence on behalf of the defendants

[13] The defendant led the evidence of four senior customs officials who essentially testified about the events as they unfolded on the 13 February 2013. They all maintain that the consignment was detained due to irregularities in the documents submitted by the plaintiff which are different from the documents presented at the Botswana Border. It is common amongst the witnesses that a customs declaration indicating that the cigarettes were being imported into Namibia for home consumption was presented which implied the payment of lesser importation duties, as opposed to the required declaration that the consignment is being moved from one bonded house to another which meant that the importer would not be paying some of the customs duties. This is accordingly an offence in terms of the Customs and Excise Duties Act. This triggered suspicions that the plaintiff is irregularly importing the cigarettes in Namibia and evading the payment of custom duties. Accordingly, it is on this basis that the consignment was confiscated and a lawful penalty of 25% was levied, to be paid before the goods could be released.

[14] It is further admitted by both witnesses that the documents were filed in by the in-house clearing agents and that the mistake was admitted to have been made as regards providing and completing the wrong declaration form. It transpired that the officials of the Southern African Duty Free Namibian (Pty) Ltd, as the importer, were then informed that the mistake could be rectified by filing in the correct declaration form ie IM8 declaration, but a decision was made by the Head of the Customs department that such contravention is serious as it is prejudicial to SACU and Namibia and that a penalty would in this instance be justified. All attempts were made to rectify the mistakes on the declaration form and a new IM8 was filed in by Southern African Duty Free Namibian (Pty) Ltd but was rejected by the customs and Excise Department

because they were not convinced that the mistake was genuine or innocent. The doubt is based on a similar transaction that happened between the same parties in 2012 where the wrong declaration form was filed in for a consignment of cigarettes in Namibia through the Trans-Kalahari border. The truck and the driver were then escorted to Rundu where the consignment is detained until to date.

Submissions

[15] Mr Van Vuuren submits on behalf of the defendant that the first and second officials have a responsibility to collect VAT from imported goods and such a responsibility is based on correct information being provided. Defendants are of the position that the plaintiff is a regular manufacturer who ought to know what type of information is needed for cross border transactions and it is the plaintiff's responsibility to ensure that the correct information is presented to the Customs officials.¹ Counsel submits that the officials have the powers², amongst others to seize goods³ in cases where there is a reason to believe that there may be a contravention of the Act. Read together with s 41, the imported is required to produce documentation pertaining to the purpose of which the goods are entering the country⁴ and that person who refuses or fails to make a declaration in terms of subsection (6), or who, in such declaration, makes a false statement, knowing such statement to be false, shall be guilty of an offence and on conviction be liable to the penalties prescribed by section 96.⁵ Counsel submits that the plaintiff has made a false declaration, which was admitted to have been wrong, then attracts the penalties as described in s 96. Counsel therefore submitted that the officials acted properly and bona fide and that the seizure and detention were all justified in this case. As regards the market value of the consignment and the damages claimed, counsel submits that since there is no evidence as regards the time as to when the cigarettes became worthless, the plaintiff failed to prove the quantum of the damages claimed.

¹ Section 41.

² Section 4.

³ Section 4(9)(a)(iv)

⁴ S 41(1)(A).

⁵ S 41(7).

[16] Mr Frank on behalf of the plaintiff on the other hand argues that damages are awarded to put the plaintiff in the position it would have been if the cigarettes were not confiscated and that the undisputed evidence as to the value of the consignment is proof enough of the quantum of damages claimed by the plaintiff. Accordingly, the agreed price is prima facie the market value of the goods in the absence of any evidence to the contrary. As regards the arrest and seizure of the consignment, counsel submits that the defendants had no statutory authority to detain the goods because s 4(18)⁶ relied on does not give the officials any statutory basis to impose penalties and the defence of bona fides raised thus falls away. Accordingly, the decision to impose the penalty was not based on any evidence but merely on discrepancies found in the documents presented. Counsel pointed out that s 94 also does not come into play because no criminal charges were ever brought against the plaintiff or Southern African Duty Free Namibian (Pty) Ltd and no admission of liability was ever made by the plaintiff.⁷ Counsel further submits that it is accepted that there was an honest mistake on the part of the plaintiff because the clearing agents were used to filing in the IM4 for local consumptions and since no actions were taken against the agents, and more so because Southern African Duty Free Namibian (Pty) Ltd was informed of the procedure to correct the IM4 by filling in the IM8.

Ruling

[17] On the evidence in its totality and the probabilities, I conclude that there was no attempt by the plaintiff to illegally import the consignment. The probabilities are overwhelming that a bona fide administrative error was made by the clearing agent. The plaintiff attempted to remedy the error immediately the error was discovered. Apart from that the imposition of the penalty was not made in terms of the relevant legislation. Legally the penalty could only be imposed once there was an admission of guilt on the part of the plaintiff. It is common cause that no such admission was made. Consequently, the detention of the consignment pending the payment of the penalty is likewise unlawful.

⁶ Section 4(18) reads: '(18) No person shall be entitled to any compensation for any loss or damage arising out of or caused by any bona fide action of or by an officer under this section.'

⁷ As required by s 101.

Costs

[18] Costs in respect of the absolution application stood over from my ruling on 12 August 2015. The defendants succeeded in part and failed in part. The plaintiff succeeds on the main claim and costs should follow the event. That means that the plaintiff should pay the defendant's costs as regards the application for absolution and the defendant to pay the costs of the applicant as regards the main claim.

Order

[19] Judgment is made in favour of the plaintiff as against the defendants, jointly and severally, the one paying the other to be absolved, in the amount of:

1. BWP928 000.00 or the Namibian equivalent thereof;
2. Costs, such costs to include the costs of one instructing and two instructed counsel
3. The plaintiff is liable to the defendants for the costs in respect of the application for absolution granted on 12 August 2015, which shall include the costs of one instructing and one instructed counsel.

PJ Miller
Acting

APPEARANCES

Plaintiff T Frank (Assisted by R Maarsdorp)

Instructed by Ellis Shilengudwa Inc, Windhoek

Defendants Van vuuren

Instructed by Government Attorney, Windhoek