REPORTABLE

CASE NO: SA 14/2014

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

WOKER FREIGHT SERVICES (PTY) LTD	**Appellant**
and	
COMMISSIONER FOR CUSTOMS AND EXCISE	**First Respondent**
MINISTER OF FINANCE	**Second Respondent**
JURANA CLEARING SERVICES	**Third Respondent**
TOMMY MUSHIMBA	**Fourth Respondent**
NEDBANK NAMIBIA LTD	**Fifth Respondent**

Coram: MAINGA JA, SMUTS JA and HOFF AJA
Heard: **3 March 2016**
Delivered: **6 April 2016**

APPEAL JUDGMENT

SMUTS JA (MAINGA JA and HOFF AJA concurring):

[1] This appeal concerns the liability of a clearing agent for customs duties where it had authorised its security to be utilised by another agent to release a consignment of cigarettes brought into Namibia from Zimbabwe (via Zambia) in

bond but which was not further exported to Angola as undertaken. The Commissioner of Customs and Excise (the Commissioner) and first respondent seeks to hold the appellant liable for those duties under a letter of authority given by the appellant in respect of security bond provided to the Commissioner. The appellant seeks to resist that and approached the High Court for an interdict to prevent that and a declaratory order to the effect that it should not be held liable for those duties. It also sought an order directed at releasing its security bond. The High Court dismissed its application. The appellant has appealed against that dismissal.

Factual background

[2] Much of the factual matter pertinent to the determination of this issue is not essentially in dispute.

[3] The appellant (Woker Freight) is a licenced clearing agent under s 73 of the Customs and Excise Act 20 of 1998 (the Act). The appellant is required by s 73(3) to provide security to the Commissioner in the manner, form, nature and amount as required by the Commissioner. The appellant provided a security bond in the sum of N$10 million in the terms set out below.

[4] In addition to providing the services of a clearing agent, the appellant from time to time as part of its business authorises for reward other licenced clearing agents to ‘utilise’ the appellant’s bonds as security for the fulfilment of their functions under s 17 and s 18 of the Act with the approval of the Commissioner.

These functions relate to the removal of goods in bond (s 17) and exporting goods from customs and excise warehouses (s 18). In terms of these sections of the Act, a person who removes goods in bond or exports goods from a customs warehouse is liable for the applicable duties. But this liability ceases upon proof that the goods were removed from the common customs area. The failure to submit that proof would however render the person or agent removing the goods to be liable for duties, payable upon demand from the Controller of Customs and Excise of that area.

[5] The appellant points out in its papers that this practice has developed into an accepted practice - where one clearing agent authorises another to make use of the former's bond in order for the other agent to transport goods in bond when the latter does not have sufficient security for a particular shipment or consignment. This is subject to the approval of the Commissioner.

[6] The dispute which gave rise to the appellant's application in the High Court arose after a consignment of cigarettes was brought into Namibia from Zimbabwe via Zambia on 3 June 2011, through the Wenela border post. A certain Tommy Mushimba, (Mushimba) cited as fourth respondent, approached the appellant to provide security by means of the appellant's bond for the consignment. Mushimba informed the appellant that Jurana Clearing Services (the third respondent) (Jurana) had been appointed as clearing agent for the consignment, but lacked sufficient security for the consignment to be taken to the Zambezi Duty Free Bonded Warehouse in Katima Mulilo before its further removal in bond to the

Oshikango border post to its onward destination of Angola. This entire exercise would not require the payment of duties in Namibia, provided that the consignment was cleared as having left Namibia. But the Commissioner requires security from agents when goods are removed in bond for onward transmission for export purposes. As Jurana did not have the requisite security, Mushimba requested the appellant to authorise the use of its own security against payment of the appellant's usual fee to do so as to enable Jurana to proceed with this exercise.

[7] The appellant then provided a first bond authorisation letter in favour of Jurana on 2 June 2011. It was directed to the Controller of Customs and Excise (the Controller) at Katima Mulilo specifying the destination of the consignment as Katima Mulilo. The terse terms of this letter on the appellant's letterhead are as follows:

'**BOND AUTHORISATION LETTER**

To: The Controller of Customs and Excise Date: 2/06/2011
Bond Number: WFS-KUC002
Principal No: 0012403015
Declarant Ref Number block 7 on SAD 500(Our job Number): TBA
Authorisation Number: B222/2011
Destination: Katima Mulilo
Permission is hereby granted to clear the following specific shipment on our Bond
Approved Border Agent: Jurana Clearing Services
Transporter: Lazer Tech Transport Reg no: N5232T,N5234T
Shipper: The Cigarette Company & Savanna Tobacco
Consignee: Zambezi Duty Free Retailer cc

Invoice Number(s): 435 & 2049
Value of the Cargo: USD$57528.00
Other information (if required)
Bond Authorisation letter is valid for this specific shipment only and may not be used for other transactions.'

[8] A second bond authorisation letter was subsequently issued by the appellant on 20 June 2011. It was in the same form with similar terms. Its approved border agent was again specified as Jurana. But the changes to the letter were in respect of the destination, now given as Oshikango, and the consignee was referred to as Joa Alberto Filhos, with an Angolan address supplied for him. The shipper's name differed slightly and was stated as Savanna Tobacco, Harare.

[9] In the appellant's founding affidavit, it was stated on behalf of the appellant that it had facilities at Oshikango and would be able to verify that the consignment would be removed from Namibia.

[10] The two bond authorisation letters provided the necessary security [under s 17(7)] to customs officials for the release of the consignment at the Wenela border post and later from the Katima Mulilo Bonded Warehouse for passage to the Oshikango border post. It is common cause that the consignment was however never cleared at the Oshikango border post. In fact, it is accepted by the parties that the consignment was never cleared for export to Angola at all.

[11] The appellant wanted to have its bond acquitted so that it could be utilised for other purposes. Its employee who dealt with Mushimba called upon the latter to provide proof that the consignment left Namibia. Mushimba provided documentation obtained from a customs official to the effect that the consignment had left Namibia at the Katwitwi border post on 24 June 2011. The appellant forwarded the entries to this effect to Customs and Excise and enquired as to whether the entries were authentic. A certain K H Lirumbu responded from the Katwitwi border post and said that he had processed the consignment and that the entries were authentic.

[12] When the appellant subsequently sought the release of the bond, these entries were investigated by Customs and Excise and found to be false and fraudulent. Their detailed investigation revealed that the goods had not in fact passed through that border post. As a result of the investigation, Lirumbu, Mushimba and another person were arrested in connection with fraud. According to Mushimba, who filed an affidavit, charges were subsequently withdrawn against him. He also denied being party to any fraud and wrongdoing levelled against him by the appellant. The amplification of his denials are however evasive and at times contradictory and serve only to raise more questions than they provide clarification. As no relief is sought against him in the application, the factual disputes raised in his affidavit do not need to be further addressed.

[13] It is accepted by the appellant and the Commissioner that the consignment was never exported to Angola and remained within Namibia without duties being

paid in conflict with the Act. The appellant insists that it was innocent in the failure to clear the consignment to Angola and in the unlawful non-payment of duties. Its professed innocence of being actively involved in unlawful conduct is supported by the undisputed facts.

[14] Given that the consignment did not leave Namibia, the Commissioner did not acquit or release the appellant's bond used by the clearing agent, Jurana, as security to cover the loss of potential duties in the event of Jurana failing to comply with the conditions for which the goods were cleared.

[15] The appellant demanded that the bond be acquitted. The Commissioner declined the demand. The appellant then brought its application to the High Court, seeking to interdict the Commissioner from presenting the bond for payment and an order declaring that neither it nor Nedbank Namibia Limited (cited as the fifth respondent), as surety, were liable for the duties in question. The appellant also sought an order directing the Commissioner to release or acquit the bond.

[16] The application was opposed by the Commissioner and Ministry of Finance. In their opposition, they made it clear that the consignment would not have been released in the absence of security provided by Jurana under s 17(7). As Jurana failed to comply with the conditions for the release of the consignment, the security provided by it rendered the appellant liable.

[17] Jurana was cited as respondent but did not oppose or participate in the proceedings. Mushimba filed an affidavit to deal with the allegations against him but did not oppose the relief sought even though his counsel filed argument and sought to address the court. Nedbank also did not oppose the application.

The approach of the High Court

[18] The court *a quo* dismissed the application with costs. It found that the appellant, when it authorised the use of its bond as security, accepted the liability to pay the debt – in the form of duties – of another (in this case, the importers) and acted as its surety. The court found that Jurana was liable to pay the duties on the consignment as clearing agent on behalf of the importer. The court found that the appellant had as surety to Jurana assumed the risk of the latter's breach of a contractual obligation to pay duties. The High Court concluded that the appellant was thus liable as a surety and dismissed the application.

Submissions on appeal

[19] Appellant's counsel, Mr G Coleman, assisted by Ms N Bassingthwaighte, attacked the High Court's approach on several fronts. They contended that the terms of the bond limited its application to a warehouse in Walvis Bay and that it could not be enforced against it in the present circumstances where it had also and in any event observed the laws relating to customs and excise. It was further argued that the bond contemplated the appellant transacting (its own) business with the Commissioner and not someone else's.

[20] It was also argued on behalf of the appellant that the scheme of the Act precluded its liability. Reference was made to s 18(1) which renders an exporter of goods liable for duties. It was also pointed out that an agent would be liable for duties under s 110(2)(*a*) and (*b*) if proven that the agent was party to the non-fulfilment of any obligation of an exporter and, when becoming aware of that non-fulfilment, it had not taken reasonable steps to prevent the non-fulfilment.

[21] It was also argued on behalf of the appellant that the letters of authorisation would in any event also not give rise to liability. This is because they state that authorisation is for use of the bond to clear the consignment and not to pay duties. It was contended that the appellant never intended to assume liability for duties.

[22] It was further contended by appellant's counsel that it should not be held liable for the fraud of a customs official and an importer/exporter. The argument proceeded that the Ministry should be vicariously liable for the fraudulent conduct of its own employee – where that fraudulent conduct occurred in circumstances which closely resembled the official's normal duties.

[23] Appellant's counsel also argued that it would be contrary to public policy to hold the appellant liable under the bond - public policy being the appropriate instrument of addressing contractual unfairness which cannot be satisfactorily addressed by existing rules.

[24] Counsel for the Commissioner and the Ministry, Mr T Chibwana assisted by Mr E Nekwaya, countered by contending that the authorisation letters meant that the appellant's bond was to be used as security which was required by Jurana to cover potential loss of duties as a condition for clearance of the consignment for its onward transmission to Angola. As Jurana failed to comply with that condition, the security provided in the form of the bond could then be invoked. Counsel for the Commissioner and Ministry pointed out that no duty would be payable if the consignment, destined for Angola, had left the common customs area and proceeded to Angola. But it had not done so. Counsel further argued that in the absence of Jurana proving that the consignment had left Namibia, the authorisation letter bound the appellant as surety for the obligations of Jurana.

[25] These issues are examined following a brief survey of pertinent provisions of the Act.

The Act

[26] As was said by the South African Supreme Court of Appeal in the context of similar but not identical customs legislation applicable in that country:

> 'The object of the Act (insofar as it relates to import duty) is to ensure that duty is collected on goods that are imported into this country and its provisions are mainly directed towards that end. It is not surprising that liability for the payment of duty should be imposed upon more than one person, or upon one person in more than

one capacity, for the Commissioner cannot be expected to know who has what interest in goods that are landed.'[1]

These views apply with equal force to the Act and its object.

[27] The Act also contains various provisions imposing liability for the payment of duties on a variety of persons who might have some interest in the consignment. This is because the definition of 'importer' includes a particularly wide range of persons, including an agent. Importer is defined in the Act to include any person who, at the time of export –

'(a) owns any goods imported;
(b) carries the risk in respect of any goods imported;
(c) represents that or acts as if he or she is the importer or owner of any goods imported;
(d) actually brings any goods into Namibia;
(e) has a beneficial interest in any way whatsoever in any goods imported; or
(f) acts on behalf of any person referred to in paragraph (a), (b), (c), (d) or (e).'[2]

[28] An agent of one of these persons may incur liability in that capacity by falling within the wide definition of importer in addition to the separate liability imposed on agents in s 110 of the Act. The definition of an exporter replicates the categories set out in the definition of an importer, with the necessary and appropriate adjustments to the activity of exporting as opposed to importing.

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[1] *Standard General Insurance Co Ltd v Commissioner for Customs and Excise* 2005(2) SA 166 (SCA) para 27.

[2] Section 1 of the Act.

[29] It is clear that the legislature cast the net wide in collecting duty in respect of goods imported and exported by providing that liability for the payment of duty falls upon a broad category of persons who might have an interest in an import or export.

[30] Section 17 deals with the removal of goods in bond. It authorises, in s 17(1), the removal of any imported goods landed in Namibia in bond to a designated place of entry in Namibia or a warehousing place or to any place outside Namibia. The removal may be by the owner or importer or seller or purchaser of excisable goods or a licenced agent. Certain strict statutory conditions apply to such removal in the ensuing subsections of s 17.

[31] Subsections 17(3), (4) and (5) which are interrelated provide:

> '(3) In addition to any liability for the payment of duty incurred by any person under any other provision of this Act, the person who removes any goods in bond in terms of subsection (1) shall, subject to subsection (4), be liable for payment of the duty payable on all goods which he or she so removes.
>
> (4) Subject to subsection (5), any liability for the payment of duty in terms of subsection (3) shall cease when it is proven by the person concerned-
>
> (a) in the case of goods removed to a place in the common customs area, that such goods have been duly entered at such place; or

(b) in the case of goods which were destined for a place beyond the borders of the common customs area, that such goods have been duly removed from such area.

(5) If any person fails to submit any proof contemplated in subsection (4) within the period of time prescribed by the rule, such person shall upon a written demand by the Controller forthwith pay the duty due on such goods.'

These subsections squarely place liability for the payment of duties on the part of a person removing the goods. That liability ceases if the conditions in s 17(4) are met.

[32] Of relevance to this matter is also s 17(7) which provides:

'(7) No entry for removal in bond shall be tendered by or may be accepted from any person who has not furnished the security in the form, nature or amount as the Commissioner may in writing require, and the Commissioner may at any time require that the form, nature or amount of such security be altered in such manner as he or she may in writing determine.'

The peremptory furnishing of security contemplated by s 17(7) plainly relates to the obligation to pay duty. That is the obligation contemplated by s 17(7) within the context of the Act and its object. No other obligation was suggested by counsel.

[33] Subsection 17(13) prohibits at pain of criminal sanction a person from diverting any goods removed in bond to a destination other than the destination declared on entry for removal in bond or deliver or cause the goods to be delivered in Namibia except into the control of the Controller at the place of destination.

[34] Section 18 places a liability to pay duty on any person who exports goods from a customs and excise warehouse to any place outside the common customs area. This liability ceases when it is proven by an exporter (as broadly defined) that the goods have been duly removed from the common customs area.[3]

[35] It is within this statutory context that security was provided to enable Jurana to remove the consignment for its onward destination of Oshikango. The terms of that security and its authorisation are to be considered and interpreted within this statutory context.

The appellant's security

[36] The appellant provided security as contemplated by s 73(3) in the form of the bond attached to the founding affidavit in somewhat archaic terms set by the Ministry. It is styled a 'multi-purpose general bond in the sum of N$10 million and provided as surety and co-principal debtor to the Government. The Government is to be paid on demand.

[37] The bond provides:

> 'That: Woker Freight Services (Pty) Ltd
>
> as Principal (hereinafter referred to as the Principal) herein represented by –

[3] Section 18(2).

. . .

as Surety/Sureties and Co-Principal Debtor(s) in solidum herein represented by –

. . .

they being duly authorised thereto by virtue of standard internal banking/insurance regulations pertaining to signing powers, are truly and lawfully indebted and are held and firmly bound to the Government of the Republic of Namibia in the sum of

N$10 000 000 (Ten million Namibian dollars)

to be paid on demand to the said Government, for which payment well and truly to be made. We bind ourselves jointly and severally each for the whole, our Heirs, Executors, Administrators and Assigns. FURTHERMORE we, the Principal Debtor(s) and CO-Principal Debtor(s) renounce and waive the exceptions: (i) Beneficium ordinis seu excussionis and (ii) Beneficium divisions with the meaning and effect of which we are fully acquainted'.

AND WHEREAS the above Principal is desirous of transacting business with the Office of the Commissioner of Customs and Excise for the Republic of Namibia subject to the provisions, rules and regulations of the laws of the Republic of Namibia relating to Customs and Excise.' (*sic*)

[38] Under the heading of 'Conditions of Bond', the following is further stated in the bond:

'Whereas the above Principal is desirous of transacting business with the Office of the Commissioner of Customs and Excise of the Republic of Namibia subject to the provisions, rules and regulations of the laws of the Republic of Namibia relating to Customs and Excise: Now the conditions of this obligation are such that if the Principal shall, to the satisfaction of the Commissioner for Customs and Excise, observe the Customs and Excise laws of the Republic of Namibia governing such

business, then this obligation shall be void; otherwise it shall be and remain in full force and effect. In addition to this general condition, the Principal agrees to the following specific conditions as indicated by his initials in the space provided.

> "Customs and Excise Warehouse Licence – Whereas the above Principal is the occupier of a certain warehouse(s) approved in terms of the provisions of the laws of the Republic of Namibia relating to Customs, for the storage of bonded goods; the condition of this obligation is such that if all the goods which are now and/or hereafter maybe from time to time deposited in such warehouse(s), shall be either exported or the full duties and taxes due and payable on the importation of such goods, or of such part thereof as shall not have been exported as aforesaid, be paid to the Controller of Customs at the Port of Walvis Bay according to the first account taken of such goods upon the landing of the same, and it terms of the provisions of the Customs laws of the Republic of Namibia then this obligation to be void; otherwise to be and remain in full force and virtue."' (*sic*)

[39] Having referred to the statutory context, the terms of the bond and letters of authorisation, I turn to the issues raised in argument in this appeal.

<u>The bond is only applicable to bonded goods at appellant's Walvis Bay warehouse and contemplating the appellant transacting its own business?</u>

[40] Appellant's counsel contend that the bond only covers bonded goods stored in the warehouse occupied by the appellant at Walvis Bay.

[41] This contention however does not make it out of the starting blocks. The clear language of the bond itself does not confine it to a warehouse at Walvis Bay. In fact, a reading of the term relied upon by the appellant in any event

contemplates that there may be more than one warehouse occupied by the appellant by use of a plural in brackets. There may be thus one or more such facilities covered by the bond. The appellant refers in its founding papers to its facilities at Oshikango. That may include a warehouse.

[42] But more fundamentally, this specific obligation (in respect of the reference to the warehouse) is expressly stated to be in addition to the general condition contained in the preceding paragraph of indebtedness in the terms stated. The appellant's obligations is thus certainly not confined to its warehouse activities. These are expressly stated to be in addition to its general indebtedness.

[43] The interpretation now contended for is furthermore contradicted by the appellant's conduct of providing the letters of authorisation and their terms, as well as by the statement in the appellant's founding papers as to its course of dealing, referred to as an accepted practice of providing letters of authorisation for reward to other agents which do not have sufficient security for the payment of duties. Significantly, the appellant did not disclose the terms of its agreement with the other agents when providing such letters of authorisation and the applicable charges, as was pointed out by Mr Chibwana. Presumably there are terms set for this facet of the appellant's business, including the contracting agents' (Jurana in this instance) obligations to the appellant. These terms, in the context of the relief sought by the appellant, should have been disclosed. The failure to do so is significant and is adverse to the appellant, given the incidence of the onus being upon the appellant to establish an entitlement to the relief sought.

[44] The appellant's own founding papers as to it being an accepted practice for it to authorise the use of its security bond by other agents negates the contention that the bond contemplates that it would be confined to circumstances where the appellant transacted its own business. On the appellant's own version confirmed by the Commissioner, it had become 'an accepted practice' for it to authorise the use of its security for other agents for reward and was thus part of its business. It is no doubt a sufficiently lucrative part of the business, given the practice to do so. No other grounds – other than for reward – are stated as to why it should do so. The appellant's legal practitioner's letter quoted below refers to this specific service (to other agents) being performed against payment of the appellant's 'usual fee' for doing so. This further confirms both the practice and that it is part of the appellant's business to do so.

[45] The contention that the bond covers only the appellant transacting its own clearing of goods business is thus not supported by the appellant's own version. The authorisation of its bond as security for others also amounted to the appellant transacting its own business of doing precisely that, with the approval of the Commissioner.

No evidence of the appellant not observing customs and excise law and appellant's intention not to be liable for duties.

[46] Counsel for the appellant further contended with reference to the general condition (of indebtedness) that it would not apply if the appellant observed the

customs and excise laws of Namibia. The appellant rightly pointed out that there was no evidence that it had breached the customs and excise laws of Namibia.

[47] But in this instance, it had authorised its security bond to be utilised by another clearing agent in respect of the latter's obligation (to pay duty). That much is clear from the curt terms of the authorisation letter. The security authorisation is in respect of a specific consignment to a specific destination for its 'approved border agent', Jurana. It expressly states that the authorisation is only valid in respect of that specified shipment and provides permission for the consignment to be cleared on its bond (by Jurana).

[48] When asked about this, Mr Coleman submitted that 'clear' in this context meant 'get the consignment out of bond and remove to the border' (to the entry/exit point of Oshikango). The meaning to be given to 'clearing' the consignment is to be determined within the statutory context. Section 17(3) makes it clear that the removal of goods in bond entails the liability for the payment of duty which ceases when the goods have been removed from the customs area. Security is a peremptory prerequisite for removal in bond as set by s 17(7).

[49] Clearing the goods is thus to be understood in this context - of providing security (for payment of duties) and meeting further conditions set in s 17(8). That is what is contemplated by clearing the goods in the terms of the letter of authorisation – permission to remove the goods in bond by providing the requisite

security (for payment of duty) for such removal and that the security would no longer be required when the goods have been removed from the customs area.

[50] Appellant's counsel contended that the appellant never intended to incur liability for the payment of duty when providing a letter of this nature with reference to a statement contained in the founding affidavit to this effect. But the meaning to be given to the letter of authorisation is to be gleaned from the terms of the letter itself within its statutory context and not by a subsequent self-serving statement contrary to those terms and which is in any event gainsaid by a statement in a letter of demand directed by the appellant's legal practitioners to Mushimba before the application was brought. The following was stated in that letter with reference to the agreement to provide a letter to authorise the use of the appellant's security:

> 'It was furthermore express alternatively implied alternatively tacit terms of the agreement between our clients and yourself that: -
>
> 1. You would pay our clients their usual fee for such Bond utilization;
>
> 2. That you would provide Customs and Excise with the necessary proof that the Cargo had been removed from Namibia in order that the liability of the owner or persons with beneficial interest in the cargo and therefore the potential liability of our clients under the Bond would cease.' (*sic*)

[51] As I have already said, the terms of that agreement are not provided or even referred to in the founding affidavit. This is significant as those terms would shed light on what obligations were secured by the bond for which the appellant received a consideration. Quite what the purpose of the letter of authority would

serve and what would be secured by the bond is not explained except by Mr Coleman's assertion that it would be used to 'clear' goods. The financial obligation which arises in 'clearing' goods is to pay duty. No other was suggested by appellant's counsel. The provision of security in s 17(7) is required in the context of removal in bond and is accompanied by an obligation to pay duty under s 17(3). That is what is secured by the provision of security. In the same letter of demand addressed to Mushimba, it is stated that the appellant was 'facing a potential liability of N$6 987 783' due to Mushimba's alleged breach. The same letter also demands from Mushimba that he cause the release of (the appellant) from 'all actual and potential liabilities arising from his utilisation of such bond'.

[52] The *ex post facto* self-serving rationalisation by the appellant of not intending to be liable for duties is not only gainsaid in correspondence directed on its behalf, but is in conflict with the only tenable interpretation to be given to its letter of authorisation in the context of the Act.

Fraud on the part of a customs official and public policy

[53] Appellant's counsel argued that it was discharged from liabilities as against Customs and Excise because one of its officials at Katwitwi had fraudulently stamped the customs declaration form (in an attempt to show that the cigarette consignment had exited from Namibia) and was thus complicit in the breach of the provisions of the Act which triggered the liability (on the part of the appellant) to pay duties. I understood that this argument was advanced in the alternative.

[54] Appellant's counsel contended that this would result in the appellant having to pay for the fraud of the importer/exporter and the customs official while it had nothing to do with it. It was argued that the appellant should not be required to pay for duties in these circumstances where a customs official was involved in the fraud – as an employee of Customs and Excise. It was argued that this would furthermore 'run counter to every principle of justice and breaches Art 18 of the Constitution and thus against public policy' to enforce such an obligation.

[55] As far as the fraud of the customs official is concerned, it related to fraudulently representing that the consignment had left Namibia through the Katwitwi border post. On the facts set out in the affidavits, this fraudulently completed customs declaration form was sought and provided after the consignment had not passed through the Oshikango exit point and the breach in Jurana's undertaking and statutory obligation secured by the appellant's bond had already occurred. Proof that the consignment had left Namibia was then understandably sought by the appellant so as to release it from the bond in respect of the consignment. A fraudulent customs declaration by the customs official was provided at the apparent instance of Mushimba to whom the appellant had looked for proof of the consignment duly leaving the country. The purpose of the fraudulent declaration consignment was to cover up the breach of Jurana's or an importer's statutory obligations. At best for the appellant on the facts properly approached in motion proceedings, it only established that this was the extent of the fraud of the customs official – as an accessory after the fact to cover up the breach of an importer and Jurana to pay duty. It did not 'trigger' the appellant's

liability. That was rather triggered by the failure of its approved agent to meet its obligations, secured by the bond. On the facts before the court, the fraud is thus not causally connected to the breach of the obligation to pay duty but amounted to an inept attempt to conceal that fact.

[56] The extent of that official's fraud established on the papers (to conceal the breaches subsequently so that the bond could be released) thus does not avail the appellant and does not preclude the Commissioner calling up the security bond.

[57] Appellant's counsel further argued that public policy demanded that duty must be paid by the party from whom it is due – stressing that the right person should pay it. But the Act places the obligation to pay on the wide category of persons, thus obviating its collection and permitting its Commissioner to look to various parties who might have an interest in the goods or their agents.

[58] Public policy as reflected in the values enshrined in the Constitution[4] would not preclude the appellant's liability on the bond on the facts of this matter, as properly approached in motion proceedings. The appellant had authorised its bond to be used as security by another agent, against what it acknowledged in its attached correspondence for its 'usual fee' and as part of its business as a clearing agent registered under the Act. When it thus did so, it authorised the use of its bond to an 'approved' agent – at its usual fee. The appellant did not take the

[4] *Moolman & another v Jeandre Development CC,* Case No SA 50/2013, unreported. 3 December 2015 para (72) – (74).

court into its confidence as to the conditions attached to that utilisation and what is entailed in the process of 'approving' an agent before permitting the utilisation of its bond against the payment of a fee. The purpose of doing so is to enable its approved agent to 'clear' a consignment in the context of security being peremptorily required by the Act for release of the goods in bond. Public policy is on the other hand served by parties being held to the terms of their commercial undertakings which facilitate the passage of goods when providing security for the payment of the customs duties to the *fiscus.*

[59] The appellant fell far short of establishing that it would be against public policy to preclude the *fiscus* from recovering duties on the basis of the commercial use of the appellant's bond as security for another agent.

[60] The appellant's argument on public policy likewise does not avail it.

[61] In short, the language in the bond is in my view clear. The appellant bound itself, upon signature of the bond, to pay the Government the sum of N$10 million but if it observed the provisions of the Act in its business, it would be released from that obligation. Thus if it were the clearing agent, it would be released if it caused the consignment removed in bond to be transported to Oshikango and cleared for Angola or if duty was paid on the consignment by someone. The appellant however authorised the use of its bond to another agent, Jurana, as security to remove the consignment in bond. That security would be released upon the due passing of the consignment to its proper destination or upon payment of the

duties. Neither of these events occurred. The obligation secured by the bond through the letter of authorisation thus becomes enforceable. The appellant thus did not establish an entitlement to the relief sought in its application. Its appeal against its dismissal must fail.

Costs

[62] Mr Chibwana sought the costs of two counsel on the part of the Commissioner and Ministry. Both the appellant on the one hand and the Commissioner and Ministry on the other were represented by two counsel. The issues raised in this appeal justify the employment of two counsel. I see no reason why such an order should not be granted. Mushimba was represented in this Court by Ms Mugaviri. But as no relief had been sought against him in the court below and on appeal, I enquired from Ms Mugaviri why her client's costs should not be confined to making his affidavit, given the allegations made concerning him and not include subsequent attendances. Ms Mugaviri did not dispute that this should be the case. The order in the court below would need to be rectified to reflect this.

Order

It follows that the order to be made is:

1. The appeal is dismissed with costs.

2. Those costs include the costs of two counsel, where engaged.

3. The order of the court below is altered to read:

‘The application is dismissed with costs. The fourth respondent’s costs are confined to the costs up to and including the filing of his affidavit.’

_____
SMUTS JA

_____
MAINGA JA

_____
HOFF AJA

APPEARANCES

APPELLANT:	G Coleman (with him N Bassingthwaighte) Instructed by MB de Klerk & Associates
FIRST and SECOND RESPONDENTS:	T Chibwana (with him E Nekwaya) Instructed by the Government Attorney
FOURTH RESPONDENT:	G Mugaviri Instructed by Mugaviri Attorneys