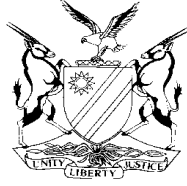


REPUBLIC OF NAMIBIA

“Special Interest”



CASE NO. A 310/2010

IN THE HIGH COURT OF NAMIBIA

In the matter between:

KONGA CLEARING AGENCIES CC

APPLICANT

and

MINISTER OF FINANCE

RESPONDENT

CORAM: DAMASEB, JP

Heard: 20TH JUNE 2011

Delivered: 23rd JUNE 2011

JUDGMENT

DAMASEB, JP: [1] The Applicant, a clearing agent, seeks the release of a consignment of tobacco products detained by customs officials in the employ of the Respondent, acting on the strength of the powers they enjoy under the Customs and Excise Act, No. 20 of 1998 (CEA). The Applicant seeks the following relief:

- “1. Declaring the Detention/Seizure Notices dated 20 and 23 July 2010 respectively as attached to the Founding Affidavit as annexures “A” and “L” respectively as invalid and null and void.
2. Declaring the detention and seizure of container bearing letters and numbers ECMU9498329 sealed under number 214589 as wrongful and unlawful.
3. Ordering the officials of the Respondent to immediately restore to the possession and custody of the Applicant container bearing letters and numbers ECMU9498329 which was sealed under number 214589.
4. Ordering the Respondent to pay the costs of this Application.
5. Granting the Applicant such further and/or alternative relief as this Honourable Court should deem fit.”

[2] The Applicant brings these proceedings by way of notice of motion, supported by an affidavit deposed to by its general manager, Escher Matthews. Matthews alleges that he is authorized to “*institute this application for and on behalf of the Applicant Close Corporation*” (My underlining for emphasis). The Respondent has not filed answering papers. As to the merits, the Applicant’s version of events is therefore uncontested. That does not mean that relief should be granted without more: I must be satisfied that the Applicant has made out a case for the relief it seeks¹; and that includes whether it has the *locus standi* to seek the relief it does.

[3] It is alleged that the Applicant is a “*clearing agent*” for a principal. The authority for the mandate as a clearing agent is dealt with in a solitary paragraph in the founding papers in the following terms:

¹*Carlos v Carlos*, Case No: I 141/10; *Lucian v Lucian*, Case No: I 501/11 (Unreported), per Heathcote AJ at p.20 para [22.10].

“The Applicant is a clearing agent as envisaged in sections 108² and 110³ of Act 20 of 1998 and was/is at all times relevant acting for and on behalf of the importer/consignee and exporter/consignor of the relevant goods in question from Dubai, United Emirates to Lubumbashi in the Democratic Republic of Congo via Walvis Bay as port of entry.”

²108 **Master, container operator or pilot may appoint agent**

(1) Notwithstanding anything to the contrary in this Act contained, the master of a ship, a container operator or the pilot of an aircraft may, subject to subsection (2) and at his or her own risk, instead of himself or herself performing any act, including replying to any question, required by or in terms of any provision of this Act to be performed by him or her, in writing appoint an agent to perform any such act on his or her behalf, and any such act performed by such agent so appointed shall in all respects and for the purpose of this Act be deemed to be the act of such master, container operator or pilot, as the case may be.

(2) Notwithstanding subsection (1)-

(a) any master, container operator or pilot referred to in that subsection shall, upon receipt of a written demand by the Controller, appear before the Controller in person, or personally attend to or act in respect of or relating to any matter contemplated in that subsection; and

(b) no master, container operator or pilot who has appointed an agent under that subsection shall be relieved from the liability for the fulfilment of any obligation imposed upon such master, container operator or pilot by this Act or to any penalty which may be incurred in respect of any obligation so imposed. [a20y1998s109]

³ 110 **Liability of agent for obligations imposed on principal**

(1) An agent appointed under section 108(1) by any master, container operator or pilot and who in writing has accepted such appointment, or any person who represents himself or herself to any officer as the agent of any master, container operator or pilot, and who is accepted as such an agent by such officer, shall be liable for the fulfilment, in respect of the matter concerned, of all obligations, including the payment of duty and charges, imposed by this Act on such master, container operator or pilot, and to any penalties or forfeitures which may be incurred in respect of such matter.

(2)(a) An agent appointed in writing by any importer, exporter, manufacturer, licensee, remover of goods in bond or other principal, and who in writing has accepted such appointment, or any person who represents himself or herself to any officer as the agent of any importer, exporter, manufacturer, licensee, remover of goods in bond or other principal, and is accepted as such by such officer, shall, subject to paragraph (b), be liable for the fulfilment, in respect of the matter concerned, of all obligations, including the payment of duty and charges, imposed by this Act on such importer, exporter, manufacturer, licensee, remover of goods in bond or other principal, and to any penalties which may be incurred in respect of such matter.

(b) An agent or person referred to in paragraph (a) shall be liable in respect of the non-fulfilment of any obligation as set out in that paragraph, if it is proven that-

(i) he or she was a party to such non-fulfilment of any obligation by any importer, exporter, manufacturer, licensee, remover of goods in bond or other principal referred to in paragraph (a); and

(ii) when he or she became aware of such non-fulfilment, he or she did not notify the Controller thereof as soon as practicable; and

(iii) he or she did not take all reasonable steps to prevent such non-fulfilment.

[4] The cause of action relates to tobacco products originating in Dubai and received at Namibia's Walvis Bay port and destined for the Democratic Republic of Congo. These products are not intended for consumption in Namibia and are in this country in transit only. The goods were, upon arrival at Walvis Bay, claimed by the Applicant as clearing agent and processed by it as such clearing

(c) No importer, exporter, manufacturer, licensee, remover of goods in bond or other principal shall by virtue of any provision of paragraph (a) or (b) be relieved from the liability for the fulfilment of any obligation imposed upon him or her by or under this Act or to any penalty which may be incurred in respect thereof.

(3)(a) A shipping and forwarding agent, or any agent acting for the master of a ship or the pilot of an aircraft, or any other class or category of agents which the Permanent Secretary may prescribe shall, before transacting any business with the Ministry, and any class of carrier of goods to which this Act relates and which the Permanent Secretary may prescribe shall, before conveying any goods, furnish to the Commissioner security in such form or in such amount as may be prescribed by regulation or as the Commissioner may, subject to paragraph (b), from time to time require for the due observance of the provisions of this Act.

(b) Notwithstanding paragraph (a), the Commissioner may require from any agent or carrier, special or additional security in respect of any particular transaction or carriage of goods.

(4)(a) An agent (including a representative or associate of the principal) representing or acting for or on behalf of any exporter, manufacturer, supplier, shipper or other principal outside Namibia who exports goods to Namibia, shall, subject to paragraph (b), be liable, in respect of any goods ordered through him or her or obtained by an importer by means of his or her services, for the fulfilment of all obligations imposed upon such exporter, manufacturer, supplier, shipper or other principal by or under this Act, and to any forfeitures which may be incurred by such exporter, manufacturer, supplier, shipper or other principal under this Act.

(b) Notwithstanding paragraph (a), an agent referred to in that paragraph shall only be liable as set out in that paragraph if it is proven that-

(i) he or she was a party to the non-fulfilment of any obligation by the exporter, manufacturer, supplier, shipper or other principal concerned; and

(ii) when he or she became aware of the non-fulfilment referred to in subparagraph (i), he or she did not notify the Controller thereof as soon as practicable; and

(iii) he or she did not take all reasonable steps to prevent the non-fulfilment referred to in subparagraph (i).

(c) Every agent of a class referred to in paragraph (a) and specified in the rules for the purposes of this paragraph, shall register himself or herself with the Commissioner and shall, subject to paragraph (d), furnish security in such form or in such amount as may be prescribed by regulation or as the Commissioner may from time to time require for the due observance of any provision of this Act.

(d) Notwithstanding paragraph (c), the Commissioner may accept security from any association of agents as may be approved by the Commissioner in writing, and which association undertakes to furnish security on behalf of its members.

(e) No agent referred to in paragraph (c) shall conduct any business on behalf of any exporter, manufacturer, supplier, shipper or other principal referred to in paragraph (a) after a date determined by the Minister by notice in the Gazette, unless such agent has complied with paragraph (c).

agent – acting as an interlocutor with the Respondent’s customs officials who, it is clear on the papers, at all relevant and material times treated the Applicant as a duly authorised agent of the principal who is the consignor/importer or exporter/consignor.⁴ Respondent’s customs officials in fact issued a ‘*release order*’ in respect of the goods to the Applicant who, thereupon, took control of them. Whilst the goods were thus under the Applicant’s control, the Respondent’s officials demanded to inspect the goods and then issued a ‘*detention notice*’ in respect of the consignment ‘*pending proof of customs documents*’.

The issue defined

[5] The first hurdle the Applicant has to cross is whether, in law, it is entitled to bring the present legal proceedings in its own name considering that it is not the owner of the goods which are the subject of the Respondent’s detention order. The Applicant does not allege or provide proof of any authority to bring the present proceedings on behalf of the principal, disclosed or undisclosed.

(f) The registration and operations of any agent referred to in paragraph (c) shall be subject to such conditions as the Permanent Secretary may prescribe by rule and the Commissioner may cancel the registration of any agent who has persistently contravened or failed to comply with any provision of this Act, or who is found guilty under any provision of section 90, 93, 94, 95 or 96.

(5) Any liability in terms of subsection (1), (2) or (4)(a) shall cease after the expiration of a period of two years from the date on which it was incurred in terms of the subsection concerned.

⁴Section 11 of Act 20 of 1989 empowers the First respondent to demand that a clearing agent produce a power of attorney by the principal on whose behalf a clearing agent claims to act. In any event, in terms of s 110 clearing agents are required to register as such and to provide security.

[6] Although the Respondent did not file answering papers, it has, through counsel, raised two points *in limine*. Mr Chibwana of the Government Attorneys Office appeared at the hearing and argued two points *in limine* and also raised other legal points. In the view that I take of the matter, I deem it unnecessary to deal with all the legal points raised and will confine myself to the point relating to the agent's competence to institute legal proceedings in its own name.

Locus Standi

[7] The first Respondent's counsel put the locus point in the written heads of argument in the following terms:

“The question that stands to be answered is whether or not an agent may sue in own name in respect of goods belonging to its principal. One submits the Court must at all times keep in mind the provisions of section 110(2) (b) (i) (ii) (iii). These provisions indemnify the agent in respect of any liabilities to the Respondent herein if he/she takes the steps as prescribed therein.” (My underlining for emphasis)

[8] Mr Mouton, in meeting the locus point, predicated the competence of the Applicant to act in these legal proceedings on behalf of the undisclosed principal, on sections 108 and 110 supra of the CEA. It boils down to this: These provisions: (i) recognise the appointment of a clearing agent by a principal for the purposes of the CEA, (ii) impose obligations on the agent for the payment of duties, levies and penalties that might be imposed by the Respondent. (For completeness, I will also refer to section 109 of the CEA. It states:

“109 Liability of principal for acts of agent

Every importer, exporter, master, container operator, pilot, manufacturer, licensee, remover of goods in bond or other principal shall, for the purposes of this Act, *be bound by any act done by an agent appointed under section 108(1) and acting on his or her behalf, whether in or outside Namibia.*”)

The submission is fine as far as it goes. The issue remains: on what basis can those provisions be said to entitle the Applicant to institute legal proceedings in its own name in respect of goods belonging to the principal?

[9] Mr Chibwana retorted that the fact that the law imposes liabilities and obligations on the agent – while not absolving the owner at the same time - does not equate to clothing the agent with the competence to substitute the principal in legal proceedings aimed at enforcing the principal’s legal rights in respect of the goods in question.

[10] Having considered the provisions relied on by Mr Mouton to meet the locus point, I must agree that the legislative intent behind those provisions is to give the Respondent the means by which to exact payment of duties and levies against a clearing agent (who is not the owner of the goods and therefore at common law not liable) together with the principal - who continues to have the primary liability for such duties and levies. I do not see anything in these provisions which supports the view that the Legislature intended to cloth the clearing agent with

the competence to act in the place and stead of the principal in legal proceedings to be instituted to vindicate the rights of the principal against a third party. In my view, therefore, the Applicant's position is governed squarely by the common law.

[11] Mr Mouton has not referred me to any authority (in this Court or elsewhere) to support his stance that the Applicant is competent to be a litigant in these proceedings in respect of goods that belong to the principal, disclosed or undisclosed. On the contrary, Mr Chibwana for the Respondent has referred me to the case of *Vaatz v Registrar of Deeds: In re Grootfontein Municipality, Vaatz v Registrar of Deeds: In re Nockel's Estate* 1993 NR 170 (HC). In that matter Frank, J non-suited a conveyancer (acting in his own name but as an agent for a principal) who sought review relief against the Registrar of Deeds. Frank J held (at 170I-J – 171A-B):

“It is thus clear to me that in both these matters the applicant acted in terms of powers of attorneys which appointed him and gave him a certain mandate. He thus acted as an agent for the principals already mentioned namely the deceased estate and the Municipal Council of Grootfontein. It was therefore, in my view, not open to him to approach the Court in his own name as he was acting as an agent for these mentioned principals and nowhere do they support these applications and nor does he say in his affidavits that he has been authorised by his principals to bring these applications. It is indeed his principals who are affected by these decisions as it is they who might suffer loss of interest or other prejudice if the deeds are not registered promptly. Where a person acts as an agent, he cannot act in his own stead, but must get the power from his principal to take any decision that is made adversely to his principal on review.

It follows, from this that, in my view the applicant therefore has no *locus standi* in the present two applications to approach the Court and I come to this decision despite the fact that prima facie I feel there is merit in at least two matters raised by the applicant.”

[12] On the facts before me, the Applicant alleges that, in acting as an interlocutor for the principal in respect of the goods in question, it did so on the mandate of the principal. As stated previously, the Applicant failed to allege in the founding affidavit that it has the necessary authority and mandate of the principal to bring the present proceedings. That being the case, the ratio in the *Vaatz* case is indistinguishable.

[13] The question of an agent acting in legal proceedings on behalf of a principal, disclosed or undisclosed, had also arisen squarely in the matter of *Sentrakoop Handelaars Bpk v Lourens and Another*, 1991 (3) SA 540⁵. What the Respondent’s objection to the Applicant’s *locus standi* raises in the case before me, is what Marais J referred to in the *Sentrakoop* matter as the agent’s “*procedural right to sue in your own name in a case where all substantive rights to sue rests in somebody else.*” At 544 F of the report, Marais J states (and I agree):

“...the principles applicable to the right of an agent who contracted on behalf of an undisclosed principal to sue, cannot and should not be applied to the procedural question of whether a person can generally sue in his own name on behalf of another.” [My underlining for emphasis]

⁵Applied in *Gravett NO v Van der Merwe* 1996 (1) SA 531 AT 537 G.

[14] After examining the authorities, Marais J concludes in the *Sentrakoop* matter as follows (at 544H-J):

“In none of the cases that I have cited ... can I therefore find any support for the suggestion that a normal agent may sue in his own name on behalf of a principal, whether the agent declares that he is so acting, or does not disclose such fact. The high-water mark of pronouncements in favour of such a right existing, are statements that such procedure may be defective, but the defect in procedure is not so great as to make it impossible to remedy the defect by substituting the correct person as plaintiff. This hardly provides authority for the proposition that an agent can in his own name properly sue on behalf of a principal.”

[15] Marais J then asks the following rhetorical questions (at 545C):

“Who is to be liable for the costs if the action is unsuccessful? The principal is not the nominal plaintiff. Is the judgment for costs to be given against the principal as the true plaintiff? On general principles of agency this may be the correct thing to do, but what if the agent has no authority but (unbeknown to the plaintiff or the principal) testifies that he has such authority and judgment is given against the unwitting ‘principal’? Or should judgment be given against the agent personally? In such case, must there be a further action to enforce the claim for costs against the principal?”

I am confronted by the same questions in the present matter!

[16] It must be borne in mind that the security contemplated in s110(3)(a) and (b) is in respect of duties and levies chargeable under the CEA and do not cover costs that might be incurred by an agent claiming to litigate on behalf of a principal.

[17] I am satisfied that the point *in limine* taken by the Respondent, that it is incompetent for the Applicant to have instituted these proceedings in its own name without authorisation, while the principal is the owner of the goods, is a good one. Accordingly, I am satisfied that the Applicant has no *locus standi* to bring the present proceedings.

[18] In the result, the Application is dismissed with costs.

DAMASEB, JP

ON BEHALF OF THE APPLICANT:

Mr Mouton

Instructed By:

Koep & Partners

ON BEHALF OF THE RESPONDENT:

Mr Chibwana

Instructed By:

Government Attorney