



NOT REPORTABLE

CASE NO: SA 10/2016

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

MINISTER OF FINANCE

First Appellant

COMMISSIONER OF CUSTOMS AND EXCISE

Second Appellant

and

BENSON CRAIG (PTY) LTD

Respondent

Coram: SHIVUTE CJ, SMUTS JA and MOKGORO AJA

Heard: 14 July 2017

Delivered: 26 July 2017

Summary: The issue raised in this matter concerned the proof of damages in a delictual claim.

The respondent, a cigarette manufacturer in Botswana, dispatched a consignment of 579 boxes of cigarettes to a duty free concern in Oshikango. After the consignment entered Namibia, customs officials impounded the consignment because the respondent's clearing agent had wrongly declared that the consignment was destined for consumption in Namibia. On the following day the

respondent withdrew the initial declaration and replaced it with one correctly stating that the cigarettes were sold in bond and destined for a bonded warehouse.

The customs officials decided to impose a penalty in excess of N\$800,000 before the consignment could be released. Despite demand, they refused to release the consignment.

The respondent instituted an action at the High Court against the Minister of Finance and the Commissioner of Customs and Excise for the return of the cigarettes alternatively their value represented by the selling price as reflected in the accompanying invoice (Botswana Pula 928,000). At the trial, the respondent called an expert who testified that he had taken samples of the cigarettes just over a year after their detention and said they were worthless given the limited 6 months shelflife of cigarettes. Another witness confirmed the terms of the sale to the duty free concern in Namibia.

Customs officials testified that the Customs and Excise Act, 20 of 1998 authorised the detention and imposition of the penalty.

The High Court found that the customs officials were not so authorised and found that the detention was unlawful and awarded damages reflecting the purchase price.

On appeal, the only issues raised concerned the proof of damages. The award was challenged on the grounds that a causal link between the delict and the

damage to the cigarettes was not established in that the respondent had not established the condition of the cigarettes prior to the time of the delict. The appellants also disputed that the respondent had not proven the value of the cigarettes at the time of the delict.

The court found that there was no reason for the High Court not to accept that the value of the cigarettes at the time of the detention was the purchase price reflected in the accompanying invoice in respect of their sale to the duty free entity in Namibia. The appellants did not dispute that the sale was in the ordinary course of business and found nothing to suspect the contrary. Evidence as to the correctness of the value given for the cigarettes had also not been disputed. There was also no evidence to suggest that the cigarettes upon departure and prior to being impounded were anything other than in a condition to be sold. Once the cigarettes were detained and their release refused and became worthless after their detention, a clear casual link was established between the delict and the respondent's loss.

As the record was filed slightly out of time, the application to condone that failure to comply with the rules and to reinstate the appeal was refused because the appeal was without merit and did not enjoy any prospects of success.

APPEAL JUDGMENT

SMUTS JA (SHIVUTE CJ and MOKGORO AJA concurring):

[1] The issue to be determined in this matter is whether the respondent established its damages in the amount of Botswana Pula (BWP) 928,000 in respect of its delictual action against the appellants. This issue arises in the following way.

Factual background

[2] The respondent is a cigarette manufacturer in Botswana. On 13 February 2013, it dispatched a consignment of 579 boxes of cigarettes to a bonded warehouse (of Southern African Duty-Free Namibia (Pty) Ltd 'SADFN'). The Namibian customs officials detained this consignment after it entered Namibia from Botswana. The cigarettes were taken to Rundu where they were detained by customs officials in a warehouse.

[3] The plaintiff's case is that it sold the cigarettes in a costs and freight (C + F) transaction with SADFN for the price of BWP 928,000 and that the purchase price was payable upon delivery of the consignment to SADFN's bonded warehouse at Oshikango. When the consignment arrived at the Botswana/Namibian border post for clearance, the respondent utilised the services of a clearing agent (PR General Dealers CC) to attend to the clearance of the consignment. The clearing agent however made a wrong declaration on the respondent's behalf in respect of the cigarettes, stating that they were intended for consumption inside Namibia. This incorrect declaration would have led to less duties being payable. As a consequence of this declaration, the customs officials detained the consignment.

[4] When the plaintiff became aware of the misrepresentation made by the clearing agents, it filed a replacement declaration, withdrawing the incorrect

declaration initially presented to customs officials and correctly referring to the consignment as destined to SADFN's bonded warehouse. Despite this, the customs officials refused to release the cigarettes unless a penalty of 25% of the excise duty was paid. This penalty exceeded N\$800,000 and had been calculated with reference to the value as reflected in the purchase price of BWP928,000.

[5] The respondent endeavoured to secure the release of the cigarettes by making representations to the customs officials and later through a trade association to which it belonged. When these representations did not succeed, the respondent instructed its legal practitioners to demand the return of the cigarettes. Notice was then given to the customs authorities that the cigarettes may become worthless through the effluxion of time should they not be released.

[6] The customs officials remained unmoved by the representations and declined to release the cigarettes without payment of the penalty.

[7] The plaintiff instituted an action for the return of the cigarettes alternatively claiming BWP 928,000 as representing the value of the cigarettes or the Namibian dollar equivalent. The plaintiff also claimed N\$30,000 in respect of transport costs of a replacement consignment.

[8] The appellants (the Minister of Finance and the Commissioner for Customs and Excise) defended the action. They denied that the detention of the cigarettes was unlawful and invoked provisions of the Customs and Excise Act, 20 of 1998 (the Act) to justify the detention of the cigarettes and the imposition of the penalty. The appellants as defendants also disputed the quantum of the respondent's loss.

Evidence at the trial

[9] One of the plaintiff's directors, Mr Nelson Nongueira, testified that he had on behalf of the respondent agreed to the sale of the cigarettes to SADFN. He confirmed the purchase price of the cigarettes and stated that the sale was in the ordinary course of business between the two entities and that there had been previous sales of cigarettes to SADFN. He also stated that the sale was on a costs and freight (C + F) basis and that ownership of the cigarettes would pass to SADFN against payment of the purchase price upon delivery to the latter at its bonded warehouse at Oshikango. He also said that the cigarettes had been cleared by Botswana customs officials at the respondent's factory prior to departure from Botswana on this basis.

[10] Mr Nongueira also stated that, once the respondent had become aware of the incorrect declaration made in respect of the cigarettes, the respondent itself filed a subsequent declaration with the correct particulars in connection with the importation of the cigarettes to the bonded warehouse of SADFN.

[11] The respondent's driver also testified as to the circumstances under which the detention of the cigarettes took place.

[12] The respondent also called an expert witness to testify about the shelflife of cigarettes being six months, once packed, wrapped and sealed. This witness testified that cigarettes would afterwards become dry and undergo a change in

taste and appearance and would not be capable of being sold. In June 2014, he had inspected samples taken from the detained consignment of cigarettes and found that they had become dry, had lost their moisture and had become worthless and could not even be recycled by the respondent or anyone else for that matter.

[13] At the conclusion of the presentation of the respondent's case as plaintiff, the appellants applied for absolution from the instance on the basis that the respondent had not established the value of the cigarettes prior to becoming worthless. The court found that there was *prima facie* evidence of the market value of the cigarettes, being the purchase price, and dismissed the claim for absolution in respect of the respondent's main claim. The further claim in respect of transportation of a subsequent replacement consignment was also the subject of absolution. There had been no evidence in support of that claim and absolution was granted in respect of it.

[14] The customs officials involved in the detention of the cigarettes and the imposition of the penalty gave evidence on behalf of the appellants. Much of that evidence is no longer relevant for present purposes in view of the fact that the appellants have correctly not contested the finding of the High Court that the detention and imposition of the penalty as a condition for the release of the cigarettes were not lawfully done under the Act.

The approach of the High Court

[15] The High Court, per Miller AJ, found that the cigarettes had not been lawfully impounded under the Act and that the customs officials had also

unlawfully sought to impose the penalty as a condition for the release of the cigarettes. The court accepted that the agreed price of BWP 928,000 in respect of the cigarettes constituted *prima facie* evidence of the market value for the cigarettes in the absence of any evidence to the contrary on behalf of the appellants. The court proceeded to award that sum to the respondent in view of the unlawful detention of the cigarettes which had subsequently lost any commercial value.

Issues on appeal

[16] The appellants noted an appeal but lodged the appeal record a few weeks out of time. They accordingly filed a condonation application for the late filing of the record and for reinstatement of the appeal. A detailed explanation is provided for the relatively brief delay. The respondent does not oppose the appellant's condonation application. This is no doubt because the explanation tendered for the brief delay is reasonable and acceptable. This is however but one component to a condonation application. The other is the requirement that the appeal should enjoy reasonable prospects of success. In order to assess whether this requirement for condonation has been met, the merits of the appeal are thus considered.

[17] The only issues raised on appeal by the appellants are in respect of the quantum of the respondent's damages. The award of BWP928,000 or the Namibian dollar equivalent is challenged on the ground that the respondent did not prove 'the required factual causal links and condition of the cigarettes at the times material hereto'. The appellants also dispute that the respondent established the quantum of its damages.

Submissions of the parties on appeal.

[18] Mr Van Vuuren, who appeared for the appellants, argued that it was incumbent upon the respondent to prove that the condition of the cigarettes was good at the time they were detained and that, by virtue of the detention, they had become spoiled and worthless. He contended that there was no evidence of the date of manufacture and concerning the storage of the cigarettes and their condition before they were impounded. He submitted that evidence of this nature was necessary to succeed with the claim. As a consequence, he contended that the respondent had not established a causal link between the detention of the cigarettes and their deterioration.

[19] Mr Van Vuuren also argued that there was no evidence adduced as to the value or market value of the cigarettes by an expert on behalf of the respondent. He pointed out that the expert testimony tendered on behalf of the respondent was only in respect of the cigarettes becoming worthless at the time of the inspection in June 2014 and as to the perishable nature of cigarettes. He argued that the failure to adduce evidence as to the value of the cigarettes at the time of the commission of the delict meant that the respondent had not discharged the onus upon it to establish the quantum of its damages.

[20] Mr Maasdorp, who appeared for the respondent, submitted that the purpose of damages is to put the innocent party – in this instance the respondent – in a position it would have been in had the wrong not been committed. He cautioned against a formalistic approach in favour of a practical, equitable and common sense approach. He referred to authority to the effect that it ought to be inferred that the agreed price for property was *prima facie* its actual market value as a

practical and equitable guide.¹ He referred to the evidence of Mr Nongueira as to the purchase price being an agreed amount as contained in the invoice and that this had not been disputed by the appellants. Nor had the appellants adduced any contrary evidence as to the value of the cigarettes.

[21] Mr Maasdorp contended that in the absence of any contrary evidence and placing the purchase price in issue in cross-examination meant that the respondent had established on the balance of probabilities that the cigarettes were worth the purchase price of BWP928,000. He also argued that the respondent had established a causal link between the delict in question and the occurrence of its loss. He submitted that the respondent was entitled to be placed in the position it would have been but for the commission of the delict and this meant that it had established its damages in an amount representing the purchase and selling price of the cigarettes.

Analysis of the contentions.

[22] The parties do not dispute that the measure of the respondent's loss is the difference between the respondent's estate after the act causing the loss and the position it would have occupied if the act in question had not been committed.² The measure of that loss is the market value of the cigarettes at the time of the delict.³

[23] The delict in this matter was the unlawful detention of the cigarettes on the part of the customs officials on 13 February 2013. That delict was of an ongoing

¹ *Ranger v Wykerd & another* 1977(2) SA 976 (A) at 993C-994A ('Ranger').

² Joubert *et al* 'The Law of South Africa (2nd ed) Vol 7 at para 62 (LAWSA).

³ LAWSA (2nd ed) Vol 8 at para 63 – 64.

nature and continued until the High Court made its finding as to the unlawfulness of that detention. It was thus a continuing wrong which was perpetrated from the date upon which the customs officials impounded the cigarettes because of the persistent refusal on the part of those officials to release the cigarettes despite demand and the subsequent institution of the action to release the cigarettes except on the payment of a penalty unlawfully imposed as a condition for the release of the cigarettes.

[24] The expert evidence tendered on behalf of the respondent was uncontested as to the fact that the cigarettes had become worthless as at June 2014 as a consequence of the continued detention. The expert's testimony as to the perishable nature of cigarettes and their limited shelf life was likewise not placed in issue. It was also common cause that the customs officials were put on notice as to the perishable nature of cigarettes shortly after they had been impounded. The respondent thus clearly established a causal connection between the cigarettes becoming worthless and the act of detaining them which continued for a period in excess of their shelf life. Given the ongoing nature of the delict, it was not necessary to pinpoint the precise date as to when the cigarettes became worthless. It was unequivocally established that they had perished as a result of the continuing detention.

[25] The two remaining questions concern whether the respondent had established the value of the cigarettes at the time of sale and of the delict and the state of their condition at the time of the delict.

[26] Mr Nongueira's evidence was that the sale of the cigarettes was the consequence of an order placed by SADFN. He confirmed that SADFN had a bonded warehouse and that the sale was thus in bond. He confirmed the terms of the sale with reference to the invoice being to SADFN, the description of the brand of cigarettes, the number of cartons and 'value in Botswana Pula'.

[27] There was no objection to this evidence confirming the value of the cigarettes (as reflected in the invoice). Nor was it at any stage placed in issue during his unduly lengthy cross-examination by Mr Van Vuuren. On the contrary, Mr Van Vuuren asked him on several occasions to confirm the correctness of the invoice which he did and the purpose of the consignment which he also did. Mr Van Vuuren subsequently elicited from him that the cigarettes had been ordered as part of a course of dealing between SADFN and the respondent. The following was also put by Mr Van Vuuren to Mr Nongueira (although with reference to the corrected clearance form):

'Okay and my instructions are that this form, the IM8 is also not correct. You would agree that this was obviously submitted the next day after the IM4 incident that occurred?—Yes.

Alright and from this it appears that the value of this consignment was required to be in the correct currency is that not correct?—Yes.

Now my instructions are that it was not converted in terms of the IM8 from Pula to the local currency that is the first problem is it not? – Yes.'

The 'other problem' put to the witness is not relevant for present purposes. It was not put to the witness that the declared value on the form was incorrect (BWP928

000). This in the face of the testimony that this second declaration provided the correct information on the consignment.

[28] When reference was made to the value by the witness in the portion quoted above, at no stage in the lengthy cross-examination was it ever put to Mr Nongueira that the value was incorrect. The only issue with the declared value was with the currency in which it was stated and not as to its correctness. The other issue raised with reference to the form is not relevant for present purposes.

[29] At no stage did Mr Van Vuuren ever put to Mr Nongueira that the sale was anything otherwise than in the ordinary course of business. On the contrary, answers were repeatedly elicited to the effect that it was.

[30] The evidence of the appellants' witnesses also do not assist Mr Van Vuuren's point taking in relation to the damages. Those witnesses testified that the imposition of the penalty was with reference to the value of the cigarettes converted from Pula to Namibian Dollars. The appellants' witnesses also accepted that the sale was from one bonded warehouse to another. At no stage was it ever questioned by them that it was anything other than a sale in the ordinary course of business.

[31] One of the appellants' witnesses, Mr Malima, a senior customs official, actually accepted that the amount on the invoice was supposed to reflect the real value of the goods. That same witness conceded that there would rather be a tendency on the part of importers to understate than overstate values. More importantly, he accepted there was nothing in the invoice itself which raised any

suspicious as to the amount of the sale. The same witness furthermore testified that he actually had confirmed the sale in question with a representative of SADFN.

[32] As to the condition of the cigarettes at the time of their departure from the premises of the respondent, the unequivocal evidence of Mr Nogueira was that the cigarettes had been packed and the cargo sealed prior to departure. The evidence of the respondent's expert was to the effect that the cigarettes had become worthless given their spoiled condition and that the respondent would not even attempt to sell them by reason of reputational damages which would ensue given their spoiled state. The respondent is after all a manufacturer of cigarettes. It can clearly be inferred from the evidence, given the reputational risk of supplying cigarettes in an imperfect condition, that those which were subject to the sale in question were in a condition to be sold. Nothing to the contrary was ever put to either Mr Nogueira or the expert. The latter was responsible for quality control within the respondent. Nor was there any suggestion on the part of the appellants' witnesses that the condition of the cigarettes upon impounding them was anything but that they would be for a sale in the ordinary course of business.

[33] There was no reason for the High Court not to accept that the value to the respondent of the cigarettes at the time of their detention by the customs officials was the purchase price reflected in the accompanying invoice in all the circumstances of this case. As was stated in *Ranger*:

' . . . I think that it can and ought to be inferred, not as a presumption or rule of law, but purely as a fact that the agreed price for the property . . . was *prima facie* its

actual market value in its represented condition at the relevant time. That approach is not only practical and equitable, it is good common sense.⁴

[34] It was never suggested in cross-examination to any of the respondents witnesses that the sale was anything other than in the ordinary course of business. In fact, Mr Van Vuuren's cross-examination only served to confirm that, as did one of the appellant's witnesses in his testimony. Mr Van Vuuren's attempt to distinguish *Ranger* on the facts (by asserting that the price in this matter was not the result of an arm's length haggling before arriving at a price) does not avail him. It fails to take into account and appreciate the underlying ratio of *Ranger*. In that matter the market value of a home was set by arm's length negotiation before arriving at an agreed price. In this matter, there was no evidence of any need to arrive at an agreed price for cigarettes in that way. There was a course of dealing between those parties which would no doubt dispense of the need for negotiation to arrive at an agreed price. The majority in *Ranger* referred to a similar factual inference drawn by the Court of Appeals in *McConnel*⁵ in respect of the sale of shares in a company. After referring in some detail to the approach of the Court of Appeals in *McConnel* the majority in *Ranger* concluded:

'That decision is cogent support for my above approach. It does not, of course, relieve the appellant of the *onus* of proving his damages: that remains on him throughout the case. It merely means that the *prima facie* inference of fact that the agreed price equated the value of the property as represented is not answered by mere argument on respondents' behalf that its actual value possibly exceeded the agreed price. For that argument to prevail there must be at least a reasonable possibility, founded on adduced and acceptable evidence,

⁴ At page 993C-D. See also *McConnel v Wright* (1903) 1 Ch. D. 546 (CA) cited in *Ranger* at 993F-G (*McConnel*).

⁵ At *Ranger* 993F-H.

of such an excess; otherwise it is pure, ineffective speculation.’⁶

[35] The respondent’s measure of damages caused by the delict is its position but for the delict, thus the diminution in its patrimony or estate as a result of the delict.⁷ The date of delict would ordinarily be the time at which the damages are measured. The measure of the respondent’s damages is the value to it of the spoiled cigarettes.⁸ In this instance the diminution to the respondent’s patrimony was reflected by the proceeds of its sale which was in the ordinary course. Its authenticity was not questioned by the appellants. Even when there was reference to the value of the consignment being reflected as the purchase price, the appellants’ counsel did not take issue with that. The respondent’s evidence of the sale and course of dealing is not answered by mere argument on behalf of the appellants without any evidential basis.

[36] It follows that the approach in *Ranger* finds application. It further follows that the respondent did establish the quantum of its damages.

[37] Nor was any basis placed before the High Court to question the condition of the cigarettes at the time of the sale as being other than of acceptable nature for the purpose of that sale. Nothing to support this point was ever put to any of the respondent’s witnesses or stated in evidence by any of the appellants’ witness. Indeed, the points raised on appeal concerning damages are without any evidential substratum and without proper regard to the totality of the facts in this matter.

⁶ At *Ranger* 993I-944A.

⁷ *Philip Robinson Motors (Pty) Ltd v NM Dada (Pty) Ltd* 1975 (2) SA 420 (A) at 428F-G.

⁸ *Robinson* at 428G.

[38] Nor do the authorities raised by the appellants in support of these points taken concerning the proof of damages find any application to the facts of this matter. On the contrary, these authorities generally support the practical and common sense approach taken by the High Court in this matter. A formalistic approach to the assessment of damages has long been deprecated by the courts, including in authorities relied upon by the appellants which rather support an approach which is rooted in practicality, equity and common sense.⁹

Conclusion

[39] It follows that the appellants' appeal against the award of damages made by the High Court is without any merit and enjoys no prospect of success. This means that condonation and reinstatement can thus not be granted. Each side was represented in this court by one instructed and one instructing counsel. There is no reason why the cost order on appeal should not reflect that.

[40] It is to be noted that the High Court omitted to include an order for interest. Both parties accepted that this was an omission. The High Court order should be amplified to include that in terms of s 19 of the Supreme Court Act, 15 of 1990. The claim is of delictual nature. Even though it can be contended that the amount of the damages was of liquidated nature at the time of the delict, in the sense that the appellants would have known what was to be paid by way of damages in order to discharge their liability, the claim may not have become liquidated upon demand as damages were claimed in the alternative to the return of the cigarettes. Certainly, the extent of the damages was ascertained at the trial when evidence as

⁹ See generally Neethling *Law of Delict* (6th ed) at p 222 and the authorities collected there by the learned author.

to the spoilt condition of the cigarettes was received and accepted,¹⁰ as was accepted by Mr Maasdorp who proposed that interest should run from date of judgment. It would follow that interest should run from the date of judgment of the High Court and not as *mora* interest claimed in the particulars of claim.

[41] The following order is made:

- a. The appellants' condonation application is dismissed with costs.
- b. The costs in this court include the costs of one instructing and one instructed counsel.
- c. The order of the High Court is corrected with the addition of the following further paragraph 4 at its conclusion:
 - '4. Interest at the legal rate on the aforesaid sum from date of judgment to date of payment.'

SMUTS JA

SHIVUTE CJ

¹⁰ See *Standard Chartered Bank of Canada v Nedperm Bank Ltd* 1994 (4) SA 747 (A) at 779B-D.

MOKGORO AJA

APPEARANCES

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