

IN THE SUPREME COURT OF SOUTH AFRICA.

(APPELLATE DIVISION)

In the matter between --

SOUTH BRITISH INSURANCE  
COMPANY LIMITED

... Appellant

and

UNICORN SHIPPING LINES  
(PTY). LTD.

... Respondent

Coram: HOLMES, WESSELS, TROLLIP, CORBETT, JJ.A.,  
et GALGUT, A.J.A.

Heard: 24 November 1975

Delivered: 27 November 1975

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J U D G M E N T .

HOLMES, J.A., :

Nestling on the south bank of the Congo River,  
about eighty miles from the Atlantic, lies the port of

/Matadi ....

Matadi in the country now known as Zaire. There it was that a cargo from Durban, consisting of 315 bundles of reinforcing rods weighing in all some 150 tons, was unloaded from the good ship "Frontier" more than five years ago; and there it was that the cargo vanished from the quay without trace, in circumstances not unattended by a hint of chaos.

So the insurer (with a cession from the shipper and the holder of the bill of lading) sued the shipping line in the Durban and Coast Local Division for the value of the cargo, which was agreed at R17 500, founding on the defendant's breach of the agreement in failing to deliver.

It was common cause that South African law was applicable: indeed, the bill of lading stipulated this.

The plea was that there was due delivery at the port of Matadi in terms of the bill of lading, with particular reference to clause 11 of its conditions of carriage of goods, which reads -

/"11. ...

"11. DELIVERY OF GOODS - At all Ports and places of delivery the Goods may be delivered into craft or otherwise to the Harbour Board or other Port Authority or their Agents, according to the rule or custom of the Port, or they may be landed, lightered, or put into Receiving Ship, Hulk or Warehouse, by the Company or by Agents nominated by the Company. All lighterage, landing warehousing or other expenses after the goods leave the ship's deck shall be payable by the consignee unless otherwise arranged at time of shipment, and in every case the liability of the Company shall cease, and the consignee bear all risk after the Goods leave the deck of the Company's ship."

The plea of delivery was set out as follows:

- "(a) During April 1970, and in terms of the said CONDITIONS OF CARRIAGE OF GOODS, the defendant made delivery of the cargo to Otraco (now known as Onatra) at Matadi.
- (b) In the course of such delivery the cargo left the deck of the vessel.
- (c) At all material times Otraco was the harbour board or port authority at Matadi.

/(d) ...

(d) i. The defendant was obliged by the laws and regulations applicable to Matadi to deliver the cargo to Otraco, or alternatively,

ii. It was the custom at Matadi for vessels such as the 'Frontier' to make delivery to Otraco.

(e) In terms of Clause 11 of the said CONDITIONS OF CARRIAGE OF GOODS the consignee bears all risks after the cargo left the deck of the vessel."

No replication was filed.

One of the basic issues at the trial was whether delivery to Otraco at Matadi was delivery to -

"The Harbour Board or other Port Authority or their Agents, according to the rule or custom of the Port" -

in terms of clause 11 of the conditions of carriage of goods in the bill of lading, supra.

/Howard, ...

Howard, J., decided this in the affirmative.

Judgment was given in favour of the defendant with costs.

The insurer (plaintiff) appeals. I shall for convenience continue to refer to the parties as the plaintiff and the defendant.

It is common cause that the onus was on the defendant to establish its plea of delivery. I express no opinion as to the correctness of this view, and I shall decide the case on this agreed basis. It is also common cause now (although not on the pleadings) that the evidence showed that the reinforcing rods referred to in the bill of lading were unloaded from the vessel at Matadi. The issue is whether the unloading constituted a due performance of the defendant's obligation. As to that, the first question is whether Otraco was the "Harbour Board or Port Authority" at Matadi.

Counsel on both sides were at one that the meaning of "Harbour Board and Port Authority" depends upon the construction of the bill of lading; and that

they had been unable to find any helpful decided cases on such interpretation. Counsel for the plaintiff contended that what was contemplated was some such body as those described in Carver, Carriage by Sea, 12th ed., vol. 2, page 861, para. 1013, and having authority such as the South African Railways and Harbours Administration under, e.g., sections 2 (4) and 3 (1) of the Railways and Harbours Control and Management (Consolidation) Act No. 70 of 1957. Counsel for the defendant, on the other hand, contended for something more modest, and ad hoc to the receipt and delivery of goods at the port. He stressed that the words must be construed in their context, namely, condition no. 11, which is headed DELIVERY OF GOODS. Delivery would take place at the port of Matadi, in particular after the goods had left the ship. In this context, counsel continued, Port Authority means the body authorised to receive delivery of cargo at the and port, exercising authority and control over the discharge

/of ...

of cargo from the ships, according to the rule or custom of the port: a body to which the goods may be delivered - see the word "to", early in condition 11. Counsel eschewed, in this connection, the notion of a body with the very comprehensive functions listed in section 3 (1) of Act 70 of 1957, or with duties in relation, inter alia, to navigation, pilotage, docking, dredging, lying at anchor in the roadstead, and so on. Having regard to the context of condition 11, on balance this seems to us the more practical construction. This was also the view of Howard, J.

On the probabilities, was Otraco such a port authority at Matadi? I turn to the evidence. Five witnesses were called by the defendant. Four of them dealt with Otraco. The plaintiff did not call any evidence. I tabulate hereunder the testimony of the four witnesses in regard to Otraco.

1. R.M. Sheridan was the second officer on the "Frontier" on the voyage in question. He had previously made three or four trips on this

/run ...





run. He said that at Matadi the unloading was done by stevedores employed by or known as Otraco. From the little he knew, Otraco was the port authority that organised the labour to come down and discharge the vessels. On his previous trips to Matadi, nobody other than Otraco had attended to the offloading. The actual work of securing the cargo into the port crane and the operating of the crane, and the disconnecting of the cargo when it is lowered on to the wharf - all of this was done by Otraco's stevedores. He knew of no organisation doing this work other than Otraco. Cross-examined, the witness said -

"As far as Otraco is concerned you first described them as stevedores; is that right? --- M'Lord I stand corrected here. Otraco, as far as I know, are the Port authority. They organise the stevedores, as far as I know the cranes. They are the working body of the port.

Now every occasion you've mentioned Otraco you say "as far as I know". I understand obviously Mr. Sheridan your dealing with the people day to day, do you

/really ...



really know what Otraco's legal position is? --- None whatsoever.

Thank you. They're the people that seem to do all the work round about the port? --- Correct, Sir.

But why they do it or by what authority they do it, you don't know? --- I don't know".

2. G.R. Stevens was the chief officer on the "Frontier". He testified that "Otraco runs the port of Matadi, they provide all the equipment, all the labour, railway wagons, sheds, fork-lifts, that is all Otraco equipment." He had sailed to Matadi several times, and had always dealt with Otraco.

Cross-examined, the witness said, 'Well, all the stevedoring gear and the railway wagons and everything is Otraco, marked Otraco, and any kind of document you might see, like those damaged things I spoke about earlier, are all relating to Otraco". The trucks and cranes were marked "Otraco".'

/"Is ...

"Is the fact of the matter that you just had a general impression that Otraco was in charge?"

No, I know as a fact that it is Otraco. There's never ever been anybody else coming down to the ship or handling the cargo in the port of Matadi while we have been discharging cargo .....

Well, they run all the actual cargo handling gear and all the cranes and things, therefore they run the port, obviously."

3. S.D.P. Pryce was the master of a ship engaged on the West African trade. He had made about twelve trips to Matadi. Asked if he knew who the port authority was, he said that Otraco handled all the discharge and loading of cargo and all the operation of the wharf organisation. Otraco was in complete control of the port, and there was no other organisation handling cargo. He produced and referred to a reference book - Hans Gade's African Harbour Pilot. It was part of his ship's equipment. He said it was reliable

/and ...

and was recognised internationally as an authoritative book on the various ports. It describes Otraco as the sole authority for the handling in discharge and loading of cargo in that port. The book was put in. Cross-examined, he said that Otraco were in charge of all wharf operations, all loading and discharging of ships and transportation into the sheds. They have warehouses.

Cross-examining counsel then read to the witness an extract from The African Harbour Pilot, as follows -

"Loading and discharging facilities:  
Cargo is handled on pallets and carried by forklift trucks. All operations are carried out by Official Authorities, named OTRACO. Vessels are not authorised to use their own labour for stowage or unstowage of goods. However, according to port regulations, all cargo is discharged or loaded on ship's own risk, and OTRACO accept no responsibility whatsoever for accidents or damage caused to persons, ships, goods or any other object."

/The ...

The witness also said that Otraco claimed for damage to the quay. There is some documentary evidence of this.

4. G.R. Allen was at the time the marine cargo superintendent of the defendant in Durban. In April 1970 he went on a voyage in the "Frontier" to acquaint himself with conditions at the various ports of call, including Matadi. He saw the unloading of the cargo in question in the case, at Matadi. As the result of his investigations at Matadi he compiled a report. One of the entries in the report was, "The Port Administration Otraco, control all port working both on board and ashore". This was partly gleaned from discussions there, and is therefore hearsay. However, he did say that, from his observation, it would have been impossible for anyone other than Otraco to attend to the discharge of the ship, adding, "They provide the labour for working on the shore and in the ships and they have a monopoly". The shore cranes are marked "Otraco".

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/Counsel ...

Counsel for the plaintiff contended that the evidence of the foregoing four witnesses established no more than that Otraco acted as the sole stevedores and seemed to provide equipment.

Proof is required, on a preponderance of probability, that Otraco is a port authority within the meaning of condition 11 of the bill of lading. As to proof, I agree with the remarks of Selke, J., in Govan v. Skidmore, 195 2 (1) S.A. 732 (N) at page 734 D -

"..... in finding facts or making inferences in a civil case, it seems to me that one may, as Wigmore conveys in his work on Evidence, 3rd ed., para. 32, by balancing probabilities select a conclusion which seems to be the more natural, or plausible conclusion from amongst several conceivable ones, even though that conclusion be not the only reasonable one".

/This ...

This was applied in Ocean Accident and Guarantee Corp., Ltd. v. Koch, 1963 (4) S.A. 147 (A.D.) at page 159 C, and in later cases in this Court.

In my view a fair conspectus of the evidence, coupled with the fact that there is no testimony from the plaintiff to gainsay it, impels the inference, to the required degree of proof, that Otraco was indeed the port authority at Matadi within the meaning of that expression in condition 11 of the bill of lading. This was the finding of Howard, J., in the Court a quo. The learned Judge said -

"Although there is no direct evidence of Otraco's legal status I think that the inference can fairly be drawn that it was not only authorised to carry out the activities which it did but was in a position of authority in regard to such activities ..... In my judgment, therefore, the admissible evidence justifies the inference that Otraco probably was a 'port authority' as envisaged by clause 11 of the conditions."

/I see ...



I see no reason for disturbing that finding.

That does not conclude the matter, however, for counsel for the plaintiff raised the further point, in this Court and in the Court a quo, that there was no proof of due delivery, in that the 150 tons of reinforcing rods were unloaded from the ship mixed up with other cargo. He cited authority on this aspect of delivery.

It was common cause that, in a case of this nature, delivery takes place when the cargo leaves the ship: when it crosses the ship's rail. Hence this contention about mixed delivery, if valid, would have to relate to a mixing in or on the ship, whether in the hold or otherwise. (Mixing on the quay, in the sense of being dumped on or with other cargo there, would be irrelevant, so it was agreed by both sides).

Counsel for the defendant objected that this point had neither been pleaded nor canvassed at the trial.

/As to ...

As to the pleadings, (on the agreed basis of the onus of proving delivery being on the defendant) the position was as follows. The plaintiff claimed damages for breach of agreement in failing to deliver the cargo, or any part thereof, at Matadi, either to the holder of the bill of lading or at all. Pausing here for a moment, one gathers that the plaintiff's case was that the cargo never reached Matadi, possibly because it was wrongly unloaded at another port en route. A copy of the bill of lading was furnished in further particulars to the claim.

The plea, as set out earlier, averred delivery to Otraco at Matadi in terms of clause 11 of the conditions of the bill of lading. In further particulars, in response to a request, it was pleaded that the cargo was delivered to Otraco; and that the cargo was discharged when it was lifted from the vessel by a shore crane operated by Otraco; and that the defendant was obliged to deliver the said cargo to Otraco by the laws and regulations in force at Matadi.

/As a ...

As a matter of interest, in further particulars requested for the purpose of trial the defendant stated that it relied, for its denial of the breach averred in the plaintiff's claim, only on the plea of delivery as set out earlier herein.

On the foregoing analysis it is in my view clear that the plaintiff, by its claim that the defendant failed to deliver at Matadi (and by its absence of a replication) was denying that the cargo reached Matadi or if it did, that there was delivery to Otraco as pleaded. If the plaintiff had wished to rely on the point that, if the cargo reached Matadi, and was delivered to Otraco, it was, when taken out of the ship, so mixed with other goods that in law there was no delivery to Otraco, the plaintiff should have replicated to this effect. It is a matter of confession and avoidance.

/However ...

However, the absence of such an averment in the pleadings would not necessarily be fatal if the point was fully canvassed in evidence. This means fully canvassed by both sides in the sense that the Court was expected to pronounce upon it as an issue. I proceed to examine the evidence to ascertain whether this was the position in regard to so-called mixed and therefore invalid delivery. Now there was admittedly evidence that some of the 315 bundles of reinforcing rods were in one hold and some in another; but this was directed towards the point that the cargo was aboard when the ship left Durban. And there was similar evidence as to the position when the ship left Luanda; but this was directed to showing that the cargo was then still aboard, for the claim, in the light of the absence of a replication, was wide enough to cover the case that the cargo never reached Matadi. Then there was some evidence about a measure of chaos on the wharf and the

/dumping ...

dumping of the "Frontier's" cargo on to some cargo already on the wharf. The purpose of this evidence is not quite clear, but it was probably to explain how the cargo came to go astray.

Three of the witnesses in the case were present when the cargo was unloaded at Matadi. The first was Sheridan, who was the second officer. His evidence runs to some 24 pages. The last two questions in cross-examination were -

"I take it, especially in view of the chaotic conditions you've described, when the cargo went off it just went off regardless of the individual consignees concerned (with no) attempt to offload cargo separately for each consignee and keep it separate? --- As they came down to a parcel of cargo in the ship's hold it was discharged.

As they found it convenient? --- Yes."

I pause here to say that the words "with no", which I have put in brackets are not in the record, but

it was accepted that the context demands them.

/That ...

That would appear to be the cornerstone of the contention that mixed delivery is no delivery in the instant case.

The second witness who saw the cargo being unloaded at Matadi was Stevens, the chief officer.

Nowhere in the cross-examination was it suggested that the 315 bundles of reinforcing rods, when being unloaded from the ship, were so mixed with other cargo as not to be identifiable or separable, and that therefore there was not good delivery.

The third eye-witness of the unloading of the cargo at Matadi was Allen, who was then the cargo superintendent. In the course of his evidence - in - chief the following passage occurs:

"May I just pause here to ask you, is it practice for the ship's personnel, the carrier, to separate different consignments? If you have fifty coils of nail wire under one Bill of Lading for consignee A and fifty coils of nail wire under a different Bill of Lading for

/consignee ...

consignee B. --- No, we stow to port.  
We stow to port and discharge to port. We  
never separate Bills of Lading unless we're  
specifically requested to do so, such as  
bringing canned fish in from Walvis Bay.

And what is the practice? How is that  
separation done? --- Well we do it either  
by rope-yarns or occasionally plastic  
separation sheets, paint. This is if it's  
the same commodity, but if it's different  
commodities - well it's then very obvious  
where your line is.

How does it get sorted out if it's the same  
commodity between separate consignees? ---  
If we're separating Bills of Lading we  
normally do it with a water-paint and it's  
then discharged to mark. It's been loaded  
to mark and it's discharged to mark. But  
in this case on the "Frontier" we haven't  
separated Bills of Lading, we just loaded to  
port with separation.

What does the expression "Loaded to port"  
mean? --- Well we just separated port

/separation ...

separation, in other words we loaded all the Luanda cargo, we knew where that was, and the Matadi cargo, Point Noire cargo and so on.

As regards to separate consignee, what is there to indicate which is which? --- Between the separate consignees nothing. The steel rods for different consignees, the steel rods, we stowed them together. The nail wire, that was all stowed together. They weren't separated by port marks or anything.

But was there any method by which the one consignee's lot can be distinguished from the other? --- Only by normally with steel they've got a small label, it's almost like a tie-on label except it's of metal, stamped, and that is the name of that consignee on the label."

I pause here to say that counsel for the plaintiff contended that the foregoing passage shows that the defendant's counsel was aware that the question

/of ....



of mixing was relevant. I think that it had not escaped the notice of counsel for the defendant that his opponent had mentioned something to a witness about mixed delivery; but that does not mean that he knew that his opponent was going to contend that it invalidated the delivery. This only came out in the argument.

Continuing with the witness, the cross-examination included the following -

"Do I understand you to say that it is not your custom at all to separate the various consignments according to the separate Bills of Lading unless you were specifically requested to do so? --- Yes, that's right.

But you merely discharge it according to the port? --- According to the port, and then it is normally tallied and separated ashore.

You leave it up to the shore people to sort it out? --- Yes."

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On a fair conspectus of the conduct of the case during the evidence stage, I am unable to hold there was the required degree of ventilation or canvassing of the unpleaded issue that mixed delivery was, de jure, no delivery. Had this been pertinently raised, counsel for the defendant might well have sought to establish acquiescence, i.e., that the bill of lading in effect, stipulated for delivery to Otraco; that Otraco took the cargo from the hold or holds, elected to accept it in the form in which it was; and put it on the quay. Counsel for the defendant also took the point that in any event there was no material mixing of the cargo, in that it would be easy for Otraco to identify 315 bundles of reinforcing steel rods weighing 150 tons from any concomitant coils of wire. On the view which we take of the matter, it is not necessary to pronounce upon this latter argument.

/To sum ...

1. The first part of the document is a list of names.

2. The second part of the document is a list of names.

3. The third part of the document is a list of names.

4. The fourth part of the document is a list of names.

5. The fifth part of the document is a list of names.

6. The sixth part of the document is a list of names.

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10. The tenth part of the document is a list of names.

11. The eleventh part of the document is a list of names.

12. The twelfth part of the document is a list of names.

13. The thirteenth part of the document is a list of names.

14. The fourteenth part of the document is a list of names.

15. The fifteenth part of the document is a list of names.

16. The sixteenth part of the document is a list of names.

17. The seventeenth part of the document is a list of names.

18. The eighteenth part of the document is a list of names.

To sum up on this issue of mixed and invalid delivery which counsel for the plaintiff sought to raise, I agree with Howard, J., that it is not open to the plaintiff to take the point, for the question of invalidity was neither pleaded nor fully canvassed in evidence.

To sum up the whole appeal, I am unpersuaded that Howard, J., was wrong in his decision in favour of the defendant.

In the result, the appeal is dismissed with costs, including those occasioned by the employment of two counsel.

  
G.N. HOLMES.

JUDGE OF APPEAL.

WESSELS,	J.A. )	
TROLLIP,	J.A. )	
CORBETT,	J.A. )	CONCUR
GALGUT,	A.J.A. )	