Case no: 752/92

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

BOB S SHOE CENTRE Appellant

and

HENEWAYS FREIGHT SERVICES

PROPRIETARY LIMITED Respondent

Coram: BOTHA, HEFER, F H GROSSKOPF,

VAN DEN HEEVER et HARMS JJA.

Heard: 8 September 1994

Delivered: 18 November 1994.

J U D G M

E N T F H GROSSKOPF JA:

During July 1988 the appellant, who owned two retail shoe stores in Johannesburg, imported a consignment of shoes ("the goods") from a manufacturer in Portugal, Marcolino Castro LDA ("Marcolino"). The goods were uplifted at Marcolino's factory and placed on board an aircraft of TAP Airways ("TAP") by a Portuguese forwarding agent, ermano Serrao Amaud LDA ("Amaud"). The goods were conveyed by TAP to Jan Smuts Airport ("the airport"), arriving on Thursday 14 July 1988. At the airport the goods were placed in the bonded warehouse of TAP, awaiting customs clearance.

It is common cause that there was a contractual relationship between the parties and that the respondent, who had acted as the appellant's clearing agent on previous occasions, was obliged to effect customs clearance of the goods and to convey them from the airport to the appellant's place of business in Johannesburg. The appellant

contended that the respondent's duties extended much further and that it was responsible for all the operations from the time the goods were collected at Marcolino's factory in Portugal until the goods were delivered at the appellant's place of business in Johannesburg. This was disputed by the respondent, who maintained that its contractual liability only started once the goods had arrived at the airport. I shall revert to this aspect.

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In order to effect customs clearance of the goods the respondent prepared a bill of entry and submitted it to customs at the airport on Sunday 17 July 1988. The bill of entry did not reflect the appellant's correct importer's customs code number ("customs number"), and customs required the respondent to prepare a voucher of correction. The respondent submitted such a voucher to customs on Tuesday 19 July 1988. In the mean time the respondent had paid to customs the sum of R21 627,60, being the duties levied on the goods. On Wednesday 20

July 1988 customs issued a release order for the goods. When the

respondent presented the release order and other relevant documents to the official at the bonded warehouse of TAP, it was discovered that the goods had been stolen. An unauthorised person had obtained release of the goods by fraudulent means on Monday 18 July 1988. The stolen goods were never recovered.

The effect of the theft was that further performance by the respondent under the contract became objectively impossible. As a result of the supervening impossibility of performance the respondent, in accordance with the general rule of our law, was discharged from further performance, while the appellant's corresponding right to claim further performance was extinguished. (See Peters. Flamman and Co. v Kokstad Municipality 1919 AD 427 at 434-5: Oerlikon South Africa (Pty) Ltd v.Johannesburg City Council 1970(3) SA579(A) at 585A-B; De Wet & Van Wyk Die Suid-Afrikaanse Kontraktereg en Handelsreg 5th ed 172 et seq,- Christie The Law of Contract in South Africa 2nd ed 563-564; Van der Merwe, Van Huyssteen, Reinecke, Lubbe & Lotz

Contract: General Principles 384-385.) The respondent contended, however, that performance under the contract was divisible, and since there had been partial performance, it was entitled to payment pro tanto. The appellant, on the other hand, maintained that the respondent's obligation to deliver the goods at its place of business formed an indivisible part of the contract, and that the contract as a whole was accordingly extinguished when such delivery became impossible. The appellant further contended that it had derived no benefit from the respondent's partial performance, and had in fact suffered damage as a result of the theft.

The respondent issued summons in the Witwatersrand Local Division claiming payment from the appellant in the amount of R 30 340,10. The appellant in turn made two counter-claims, claiming R72 092,00 as damages for loss of the goods, and R51 216,05, subsequently reduced to R45 172,56, in respect of loss of profit.

The matter was heard by Goldstein J who upheld the

respondent's claim to the extent of R29 969,85, and dismissed the appellant's counter-claims. The amount of R29 969,85 comprised disbursements amounting to R27 506,47, and fees in the sum of R2 463,38. The disbursements included the R21 627,60 duties paid by the respondent to customs, and an amount of R5 655,32 paid by the respondent to Arnaud in respect of airfreight. The amount of R2 463,38 claimed as fees was made up mainly of an "import agency" fee of 8% on all the disbursements which had been paid by the respondent.

Leave to appeal to this court was granted by the court a

The respondent's claim was based on contract, and the onus of proving its terms rested on the respondent. In its amended particulars of claim the respondent relied on an oral agreement concluded on 20 November 1987 between the respondent, represented by Mr Dey, and the appellant, represented by Mr Bulbulia. According to the respondent its duties in terms of this alleged agreement only commenced once the

goods had arrived at the airport. Then it became obliged to attend to degrouping freight, customs clearance of the goods, and transportation thereof to the appellant's place of business. (Prior to amending its particulars of claim the respondent had relied on an oral agreement which had been concluded between the parties in June 1988 in terms of which the respondent in addition had to arrange for the transportation of the appellant's goods from Portugal. The respondent further averred in its original particulars of claim that pursuant to such agreement the respondent arranged for the carriage of the goods by TAP to the airport through Arnaud, "its agent in Portugal".)

Dey, who testified on behalf of the respondent at the trial, specifically denied in the course of his evidence that the respondent ever agreed to forward the goods from Portugal, or to appoint a forwarding agent to do so. According to his testimony he and representatives of Arnaud went to see Bulbulia during November 1987 at the appellant's place of business. Dey was asked what the purpose of the meeting was.

He replied as follows:

> "The purpose of the meeting was, in the first instance for Arnaud to renew their business relationship with Bob's Shoe Centre as forwarders and for us as Heneways to renew our business relationship as clearing agent."

Dey further testified:

> "....what was agreed to was that we would, that the [respondent] would continue as the [appellant's] clearing agent, that Arnaud would remain as the [appellant's] forwarding agent."

This evidence was given nearly five years after the November 1987 meeting and one gets the impression that Dey was inclined to reconstruct. It is evident from Dey's testimony that the respondent and the appellant had done business before. Aspects such as the terms of payment, which had previously been agreed upon, were not even touched on in November 1987. Dey further made it quite clear that the parties

did not conclude any new agreement at this meeting. Nor was that the object of the meeting. At best for the respondent the parties merely reaffirmed certain aspects of their previous agreement. In fact, on Dey's version there was no real reason for holding any such meeting.

Bulbulia, who gave evidence on behalf of the appellant at the trial, emphatically denied that the appellant had appointed Arnaud as its forwarding agent in Portugal, or that Arnaud ever acted as its I representative. Bulbulia agreed that Dey and two strangers, who were introduced to him as the respondent's agents in Portugal, came to see him during November 1987 at his place of business. This was after a carton of imported goods previously handled by the respondent for the appellant had been lost en route to South Africa. The appellant thereafter insisted that its goods be transmitted by means of direct flights from Portugal to South Africa. According to Bulbulia the November 1987 meeting was arranged by the respondent to reassure the appellant that there would in future be no further delays or loss of goods resulting from overseas

transshipments of freight. In my view Bulbulia gave a far more convincing motive for holding the meeting than Dey did.

The evidence shows that the parties already had a working business relationship by the time the goods in question were imported in July 1988, and it was accordingly not necessary for them to spell out what their respective rights and duties would be in this particular instance. After ordering the goods from Marcolino, Bulbulia got in touch with the respondent in June 1988. He spoke to Dey over the telephone and confirmed the repondent's rates. He gave Dey the name and address of the supplier in Portugal and asked that the respondent attend to the delivery of the goods.

Dey gave a different version of this telephone discussion in June 1988. According to Dey, Bulbulia advised him that he had a large consignment of shoes on order from Marcolino and Bulbulia asked "if [Dey] would contact Amaud to give them his instruction ...to contact the supplier and forward the goods on [the appellant's] behalf to South

Africa." The learned judge a quo found this piece of evidence of Dey to be artificial and unconvincing. I agree with that finding. Dey throughout his evidence went out of his way to stress the point that Arnaud was acting on behalf of and on the instructions of the appellant. There are however strong indications that Amaud was acting on instructions from the respondent and as its representative.

Apart from this one aspect, to which I shall return, there does not appear to be any real dispute about the terms which governed the contractual relationship of the parties. Some of those terms arose from trade usage and custom and were therefore imported by law. (Alfred McAlpine & Sons (Pty) Ltd v Transvaal Provincial Administration 1974(3) SA 506(A), per Corbett AJA at 531 E-H.) Other unexpressed provisions of their contract were those tacit terms which derived from their actual or imputed common intention, as inferred from the express terms of their agreement and the surrounding circumstances. (Alfred McAlpine's case, supra, at 531H-533B.)

It is common cause that, factually, importing the appellant's goods involved the following separate operations:

(a) the forwarding agent (Arnaud) had to collect the goods from Marcolino's factory in Portugal, convey them to the forwarding ! airport, and consolidate this consignment with others intended for the | same airport of destination;

(b) the forwarding agent (Arnaud) had to arrange for TAP to carry the goods from Portugal by direct flight to the airport in South Africa, and pay the airfreight to TAP;

(c) the degrouping agent (the respondent) had to attend to the degrouping of the individual consignments after the arrival thereof at the airport, by distributing the relevant house air waybills to the individual importers or their respective clearing agents, and to reimburse Arnaud for the airfreight;

(d) the clearing agent (the respondent) had to prepare a bill of entry in respect of the goods, pay the required duties to customs and

obtain clearance of the goods from customs;

(e) the local carrier (the respondent) had to take delivery of the goods from customs and convey them from the airport to the appellant's place of business in Johannesburg.

These various operations were all covered by the express or implied and tacit terms of the agreement concluded between the parties. It was common cause that the respondent had agreed itself to perform the last three steps in the chain of events, each one in a different capacity. The only aspect which remained in dispute, as indicated above, was which one of the parties was responsible for forwarding the goods, and so obliged to appoint a forwarding agent to attend to those duties in Portugal. The respondent denied that it was obliged to attend to the forwarding of the goods in Portugal, and alleged that Arnaud acted as forwarding agent for the appellant. The appellant averred the exact opposite.

It is in my opinion not necessary to determine who

appointed Arnaud as forwarding agent in the first instance, and although I have misgivings about the respondent's version on this aspect of the case I do not propose to make a specific finding on this score. For the purpose of this case I shall assume in the appellant's favour that the respondent was obliged in terms of their agreement to attend to all I aspects of the importation from the moment the goods were uplifted at Marcolino's factory until they were delivered to the appellant at its place of business.

The main defence raised by the appellant was based on the so-called exceptio non adimpleti contractus. (See Crispette and Candy Co Ltd v Oscar Michaelis NO and Another 1947(4) SA 521(A) at 537; Ese Financial Services (Pty) Ltd v Cramer 1973(2) SA 805(C) at 809A-G; BK Tooling (Edms) Bpk v Scone Precision Engineering (Edms) Bpk 1979m SA 391(A) at 415G-H, 418A-419H; De Wet & Van Wyk 196 ef seq.) The appellant submitted that the contract between the parties was a single and indivisible one in terms of which the

respondent was obliged to bring the goods from the door of Marcolino's factory in Portugal to the door of the appellant's retail store in Jeppe Street, Johannesburg, while the appellant, for its part, only became obliged to pay the respondent once there had been complete performance by the respondent of this contractual obligation. The respondent was, of course, relieved of further performance because of the supervening impossibility of performance caused by the theft of the goods. The appellant contended that the principle of reciprocity applied to this i contract and that once the respondent's obligation to deliver the goods was extinguished by the supervening impossibility of performance, the appellant was also discharged from its counter-obligation to pay. (De Wet & Van Wyk 173.) The question is whether the appellant nevertheless remained liable to pay the respondent for services rendered and disbursements incurred up to the time when further performance became impossible. The answer depends on whether performance under the contract was divisible or not. The appellant argued that, the contract

being entire and the performance indivisible, it was not liable for part payment in respect of partial performance. (Cf Bedford v Uvs 1971(1) SA 549(C) at 553B-C.)

There are no hard and fast rules to determine whether a performance is divisible or indivisible, and no real assistance can be derived from considering the question of divisibility in this particular case with reference to other types of contract, such as a contract to build a house for instance. (See Wessels The Law of Contract in South Africa 2nd ed §1612-4; De Wet & Van Wyk 145.)

In determining whether performance in the present case was divisible or indivisible, little assistance can be derived from cases dealing with severability in contracts in restraint of trade. There a special application of the doctrine of severability obtains and those cases should not be applied out of context. (See Christie 458-461, 465.) The present case is concerned not with the problem of severing an illegal or void provision in a contract from the rest of it (cf Du Plooy v Sasol Bedrvf

(Edms) Bpk 1988(1) SA 438(A) at453E-H; Sasfin (Pty) Ltd v Beukes 1989(1) SA 1(A) at 15I-16C, 17C-H), but with the divisibility or indivisibility of performance. The principles governing the severability of an illegal or void provision may, however, be of assistance when considering the problem of divisibility (cf Van der Merwe, Van Huyssteen & Others 226, 229).

In dealing with the related issue of severability of an offending provision at 16A-B in the Sasfin case, supra. Smalberger JA quoted with approval a passage from Vogel NO v Volkersz 1977(1) SA 537(T) at 548F to the effect that the fundamental and governing principle for determining severability is to have regard to the probable intention of the parties as it appears in, or can be inferred from, the terms of the contract as a whole.

There can be no doubt that the intention of the parties plays an important role in determining whether performance is divisible or not; eg where two horses are sold, in the nature of things performance is

divisible, but not if the parties intended the horses to be sold as a pair. (See Voet 21.1.4; Collen v Rietfontein Engineering Works 1948(1) SA 413(A) at 434-5.) Where the intention of the parties regarding divisibility is expressly stated in the contract, cadit questio, but when their probable intention has to be inferred from the terms of the contract as a whole, the nature of the performance can be of decisive importance. (Cf De Wet & Van Wyk 145; Van der Merwe, Van Huyssteen & Others 227.) In the present instance there was no express agreement as to the intention of the parties with regard to divisibility of performance, and the opinions of the respective witnesses at the trial are of no assistance in deciding the issue.

Performance will usually by its very nature be divisible where the contract makes provision for separate or distinct performances, but it may also be divisible where the contract provides for a composite performance which can be subdivided. (See Van der Merwe, Van Huyssteen & Others 226-228.) In the present matter the appellant's case

was based on the premise that performance was indivisible solely because there was allegedly a single indivisible contract. The divisibility of the contract as such is however not a prerequisite for the divisibility of its performance (cf Van der Merwe, Van Huyssteen & Others 226-228); and even if the parties intended the contract to be a single one, it still made provision for a composite performance consisting of separate and distinct operations, eg the forwarding and degrouping of the goods, the customs clearance thereof, and the final transportation of the goods to the appellant's place of business. That, to my mind, is a strong indication of the divisibility of performance.

Divisibility of performance does not depend on the divisibility of the counter-performance (cf Van der Merwe, Van Huyssteen & Others 228), but proof of a divisible counter-performance creates a presumption that the performance is also divisible, provided each distinct performance can be related to a corresponding part of the divided counter-performance. (Cf Du Plooy v Sasol Bedrvf supra, at

453E-H, a case which dealt with the severability of a void provision from the rest of the contract.) In the present instance the appellant's counter-performance was divisible to such an extent that a specified quid pro quo could be allocated to each distinct performance. We know for instance that the "import cartage" for the transportation of the goods from the airport to the appellant's retail store amounted to R245,25. When this part of the respondent's performance became impossible, the corresponding R245,25 of the counter-performance could easily be deducted from the respondent's claim. The fact that a separate part of the performance could be related to a corresponding part of the counter-performance shows that the parties probably intended performance, and indeed the contract itself, to be divisible.

The performance which became impossible in the present case was the delivery of the goods to the appellant's place of business. It was the last of the respondent's obligations. In contrast to its other obligations, the transportation of the goods required no special expertise

on the part of the respondent, and could in fact have been carried out by any small cartage contractor. The low price which the respondent charged for performing this additional obligation shows that it was regarded as an unimportant collateral matter. The obligation to transport the goods from the airport was, by its very nature, merely subsidiary to the main purpose of the contract, viz the expeditious forwarding and customs clearance of the goods. (Cf Cameron v Bray Gibb & Co (Pvt) Ltd 1966(3) SA 675(R) at 676A-677A.)

A useful test which can be applied in deciding whether a particular provision of a contract is subsidiary to the main purpose, and therefore severable from the rest, is to determine whether the parties would have entered into the contract without that provision. (Cf Kriel v Hochstetter House (Edms) Bpk 1988(1) SA 220 (T) 227H-228A; Sasfin's case, supra, at 17D-H, 24B-D; Christie 464.) Although we are here not dealing with the severability of an offending provision, the present matter is likewise concerned with the "severance" of a part of the

contract - not because it was an illegal or void provision, but as a result of the supervening impossibility of performance. I would therefore apply the same test in this case to determine whether the term which became impossible of performance was subsidiary to the main purpose and therefore severable from the rest.

Bulbulia alleged in the course of his evidence that the appellant decided to appoint an expert to attend to all the operations involved in getting the goods bought in Portugal from the seller to his store here; but, as pointed out before, no expert was required to convey the goods from the airport to Johannesburg. It accordingly seems to me to be likely that the parties would have concluded the contract even if it had not provided for any such transportation. In my opinion this provision regarding the transportation was in any event not material to achieve the appellant's ends. I therefore conclude that the provision relating to the transportation of the goods was merely subsidiary or collateral to the main purpose of the contract. As such it was severable

from the remainder of the contract.

For the reasons set out above I am therefore of the opinion that performance was divisible. The appellant's main argument can accordingly not be upheld.

The appellant's second argument was that the respondent could not rely on the supervening impossibility of performance inasmuch as the impossibility was self-created. The appellant contended that the impossibility resulted not from vis major or casus fortuitus, but from the respondent's own breach of contract, and that the respondent accordingly remained bound by the contract. (See Benjamin v Myers 1946 CPD 655 at 662; SA Crushers (Pty) Ltd v Ramdass 1951(2) SA 543(N) at 546H-547G; Grobbelaar NO v Bosch 1964(3) SA 687(E) at 691C-G; De Wet & Van Wyk 174-6; Van der Merwe, Van Huyssteen & Others 384-6; Christie 565.)

It is common cause that the respondent failed to insert the appellant's correct customs number in the bill of entry and that customs

required the appellant to prepare a voucher of correction. This caused a delay in customs clearance. The appellant submitted that the respondent, who professed to be an expert in this field, was obliged to enquire from its lay customer, the appellant, what its correct customs number was, and that its failure to do so resulted in the goods being delayed in the bonded warehouse of TAP. Assuming that the respondent was liable for the delay, the question still remains whether in law that delay caused the supervening impossibility of performance. In the final analysis the impossibility of performance resulted from the theft of the goods, and in my view the delay caused by the wrong customs number on the bill of entry did not contribute causally to that theft. I say this notwithstanding the ill-advised concession made by Mr Henegan, who testified for the respondent, that the wrong customs number resulted in the goods being detained by customs, which caused the theft. It was not for Henegan to decide on the issue of the causation, but for the court. The parties appear to have accepted a report from TAP that

the theft of the goods took place on Monday 18 July between 15:30 and 16:30. It is common cause that the bill of entry with the wrong customs number was submitted by the respondent to customs at the airport on Sunday 17 July 1988. The uncontroverted evidence of both Dey and Henegan was that once the relevant papers were lodged with customs it normally took two working days to get imported goods released by customs. So even with the correct customs number the respondent would not have been able to obtain customs clearance of the goods before the afternoon of Tuesday 19 July 1988 at the earliest. Henegan did say that the respondent actually had "a result" as early as Monday morning 18 July 1988, but that was merely a reference to the notification by customs that the goods had been detained on the Monday as a result of the wrong customs number having been entered in the bill of entry. I therefore find that the impossibility of performance was not self-created. It was not due to any fault on the part of the respondent, or to an act or omission amounting to a breach of contract.

Accordingly the supervening impossibility of performance operated to extinguish the obligation to perform. The appellant, however, contended that the respondent bore the risk of any supervening impossibility of performance, and advanced three arguments in support of its contention. In the first place the appellant relied on Voet 19.2.37 for its argument in this connection. This passage of Voet was cited with approval by the trial court in Bothwell v Union Government (Minister of Lands 1917 AD 262 at 280, and by this court in Oerlikon SA (Pty) Ltd v Johannesburg City Council 1970(3)SA579(A) at 584A-B. The appellant's submission was that the contract in the present instance was one of locatio conductio operis, and as performance by the respondent had not yet been "completed and approved", according to Voet the risk of loss fell on the respondent. However, the type of contract which was contemplated by Voet in the passage cited, and which featured in the two cases referred to, was a building or construction contract, differing totally from the contract in the present case. I would not describe this contract

as a locatio conductio operis, but rather as a contract sui generis, comprising elements of mandatum,depostum and carriage of goods. But whatever label one may attach to this contract, it should be borne in mind that performance in terms thereof was divisible, as explained above. This clearly distinguishes the present contract from the typical building or construction contract which Voet had in mind.

The appellant submitted in the second place that as the respondent was an expert in this particular field of activity, it impliedly or tacitly undertook the risk of any loss occasioned by the supervening impossibility of performance. The case on which counsel for the appellant relied in this regard, Kroonstad Westelike Boere Ko-operatieweVerenigingBpkv Botha and Another 1964(3) SA 561(A), does not assist him. That case deals with the liability of a merchant seller, who professes to have expert knowledge, for consequential damage caused by a latent defect in the thing sold. The principles there enunciated cannot in my opinion be extended to the type of contract with

which we are dealing. The appellant's submission that the respondent impliedly or tacitly contracted to carry the risk by virtue of the fact that it was an expert in the Geld, cannot be sustained.

There was a third and further ground upon which the appellant based its submission that the risk of loss fell upon the respondent, viz that the respondent was liable by virtue of its being a depositary through its alleged agents Arnaud and TAP. I shall assume without deciding that the respondent was indeed a depositary. In the absence of express agreement to the contrary a depositary in the case of an ordinary depositum or bailment for reward bears the onus of proving that loss of or damage to the stored goods was not due to any negligence on his part. (See Frenkel v Ohlsson's Cape Breweries Ltd 1909 TS 957 at 9623, 965, 974-5; Rosenthal v Marks 1944 TPD 172 at 176; Government of the Republic of South Africa v Fibre Spinners and Weavers (Pty) Ltd 1978(2) SA 794(A) at 802D-H.) But as Murray J remarked in Rosenthal's case, supra, at 176, "[t]he bailee

is not an insurer of the article deposited for safekeeping and is consequently not liable for the effects of a casus fortuitus". On the findings already set out in this judgment the respondent did in fact establish that the loss occasioned by the theft was caused by casus fortuitus, and not by any fault on its part. In view of the aforegoing I conclude therefore that the respondent did not bear the risk of loss as a result of the supervening impossibility of performance.

The appellant's appeal against the dismissal by the court a quo of its claims in reconvention remains to be considered. They are based on breach of contract, alternatively on delict. Insofar as the appellant relies on the respondent's alleged breach of contract, there is no need to repeat what has been said before. For the reasons set out above I have reached the conclusion that the respondent did not commit any breach of contract. The counter-claims cannot, therefore, succeed on that ground. Insofar as the respondent's counter-claims are based on delict, I need only reiterate that there is no evidence to show that the appellant's

loss was caused by any fault on the part of the respondent. The appellant's counter-claims can accordingly also not succeed on the alternative basis of delict.

In the result the appeal is dismissed with costs.

F H GROSSKOPF, JA Botha
JA Hefer JA Van den Heever JA Harms JA Concur