IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

CASE NO 328/2001

In the matter between

SQUID PACKERS (PTY) LTD
Appellant

and

LOUIS OLLEMANS **Respondent**

CORAM: **HOWIE, SCHUTZ, MPATI, NUGENT JJA et HEHER AJA**

Date Heard: 1 November 2002

Delivered: 25 November 2002

Transfer of rights in respect of fishing permits - Contracts for - Breach - Damages.

J U D G M E N T

HOWIE JA

HOWIE JA

[1] The appellant sued the respondent in the High Court at Port Elizabeth on the basis that the respondent was a surety for Robberg Trawlers (Proprietary) limited ("Robberg") and that Robberg was liable to the appellant in damages.

[2] At all times material to the case the respondent was a director and member of Robberg and in sole control of its assets and affairs.

[3] In 1985 Robberg sold to a partnership known as South Cape Squid Packers a deep-sea fishing vessel, the TK, together with the rights to the boat licence and fish-catching permits then pertaining to it.

[4] The boat licence is of no real present importance. This case is about the catching permits. For convenience I shall refer to them simply as "permits". They constituted the authorisation granted in terms of the applicable sea fishing legislation in force during the years with which the litigation is concerned, being the Sea Fisheries Act 58 of 1973 and after its repeal the Sea Fishery Act 12 of 1988, together with regulations made in terms of those Acts The permits entitled the holder to catch the species mentioned in the permit documentation issued by the relevant department of state ("the department") which was responsible for administering the legislation.

[5] It is unnecessary for the purposes of this judgment to refer to the statutory and regulatory provisions governing permits or to describe in any detail the bureaucratic machinery involved in the issue of permits. It suffices to say that permits themselves are not in law capable of being sold. What can be sold, and were sold in this very matter, are the rights that entitle the purchaser to apply to the department for the issue of permits to it as permit holder in place of the seller who relinquishes them.

[6] In this regard, as counsel were agreed, the position is similar in all relevant respects to that which obtains in the case of a licence. Its issue is

the prerogative of the licensing authority. The authorisation is a personal statutory privilege specific to the licensee. The latter cannot transfer the licence to someone else. A contract for the sale and transfer of a licence therefore imposes no more on the seller than the obligation to do all in its power to have the licence issued to the buyer. To enforce that obligation the buyer has a personal right against the seller to compel performance: *Fick v Woolcott and Ohlsson's Cape Breweries Ltd* 1911 AD 214 at 230; *Slims (Pty) Ltd and Another v Morris NO* 1988 (1) SA 715 (A) at 737J - 738B; *Aquatur (Pty) Ltd v Sacks and Others* 1989 (1) SA 56(A) at 64H - 65D.

[7] Bearing the true legal position in mind, it is nevertheless convenient for present purposes, as was done in evidence and in argument before us, to speak about the sale and transfer of licences and permits and to regard licences and permits as disposable property.

[8] At the time of the sale in 1985 the permits pertaining to the TK were what were known in the fishing industry as B permits. They authorised the catching of various marine species, including squid. The partnership was then, as the appellant, its successor, was later, very substantially involved in the business of catching and marketing squid. Robberg was a much smaller participant.

[9] A permit, apart from pertaining to a specific vessel, was an authorisation limited also in its extent. It allowed only one person per permit to catch. The authorisation sold in 1985 was loosely referred to in the record as "a six-man B licence" but, strictly, it comprised six B permits.

[10] Despite their having been sold in the 1985 transaction, the TK and the B permits remained registered in the name of Robberg. The reason for that I shall deal with in due course.

[11] In 1987 the department took various steps to regulate the very lucrative and burgeoning squid fishing industry more closely. In addition to imposing a moratorium on the transfer of squid permits, it confined authorisation to catch squid to what were called C permits. According to the evidence, the issue of C permits depended on an applicant's recent catching performance using its existing permits. If eligible for C permits, a holder of B permits for example, would receive a C permit for every B permit. The terminology of the industry was to call the permits that were augmented in this way BC permits. The upshot was that in or after 1987 Robberg became the holder of six BC permits. I shall call them "the TK permits".

[12] In 1989 the partnership concluded a written agreement with Robberg as represented by the respondent. In terms of the agreement the TK was

resold to Robberg. In a clause headed "Licence" the agreement recorded that in 1985 "the fishing licence attaching to the boat" (which, it was common cause, meant the original B permits) had been acquired by the partnership from Robberg. It went on to say that the "licence" (which would by 1989 have been six BC permits) had still not been transferred into the partnership's name and added "as such rights attaching to the licence are still not transferable". (This was a reference to the constraints imposed by the moratorium.) It then recorded that

> "all rights attaching to such licence vest in [the partnership] and same will be transferred into [its] name as soon as such transfer becomes formally possible",

and that

> "ownership in such licence shall vest in [the partnership]".

[13] In other words, although Robberg was re-acquiring the TK, the TK permits, which were then still in Robberg's name, were liable to be transferred to the partnership when the moratorium ended. As it happened, Robberg did not pay for the TK and, in terms of the agreement, its ownership never reverted to Robberg.

[14] At the same time as that agreement was entered into the respondent signed a written suretyship in favour of the partnership in which he bound himself as surety and co-principal debtor for the due payment of any money owing then or afterwards, for any reason, by Robberg to the partnership.

[15] With effect from 1 June 1990 the partnership was dissolved and the appellant, a proprietary company, acquired all the partnership's rights and assets including a fishing vessel named the "Renata".

[16] In September 1990 the appellant and Robberg, through the respondent, agreed orally that two BC permits attaching to the "Renata" would be transferred to the TK. The latter was, as I have indicated, the appellant's property but still registered in Robberg's name. Accordingly, the two permits were issued by the department, also in Robberg's name. I shall call them "the Renata permits".

[17] In October 1992 the moratorium was lifted. It is convenient to recap

as regards the position obtaining then:

1. The TK was the property of the appellant but registered in Robberg's name.

2. The TK permits were registered in Robberg's name but, as between Robberg and the appellant, the latter was entitled to apply to have them issued in its name.

3. The Renata permits were registered in Robberg's name but, as between Robberg and the appellant, they were to attach to the TK.

[18] In March 1996 the respondent caused Robberg to sell the rights to acquire all eight permits to Striker Fishing CC ("Striker") for R15 000.00 per permit and pursuant to the sale the department issued the permits to Striker.

[19] In April 1998 the action was instituted. The particulars of claim comprise claim A and claim B. Claim A concerns the TK permits and claim B the Renata permits. In claim A it is alleged that Robberg held the permits as nominee of, first, the partnership and later, the appellant; that the appellant was entitled to demand transfer at any time; and that demand by letter was made in June 1996 by which time the respondent had caused Robberg, in breach of its obligation to the appellant, to sell and transfer to Striker. The pleader alleges that the sale and transfer were "wrongful and unlawful" and that the respondent, being aware of the salient facts, acted "wrongfully and unlawfully" in causing Robberg to sell. The claim, based on the respondent's and Robberg's conduct, is for damages in the sum of R192 000.00 made up as to R2 000.00 per B permit and R30 000 per C

permit.

[20] In claim B, for R64 000.00, made up in the same way, it is alleged that the Renata permits were, by agreement, transferred to, and held by Robberg as agent or nominee of the appellant; that it was implicit in that agreement that they would be re-transferred to the appellant on demand; and that the respondent, knowing all these facts, "wrongfully and unlawfully" caused Robberg to dispose of them to Striker before any such demand was made.

[21] Despite the pleader's failure to make it clear whether the claims were intended to be based on breach of contract or on delictual conduct, counsel for the appellant, (who did not draw the particulars of claim), argued at the trial and in his heads of argument on appeal, that his client's case was based either on the *actio exhibendum* or on a condiction. The learned trial Judge found that certain essential elements of those two causes of action had not been proved. It is unnecessary, however, to decide whether the Judge was right. In response to enquiry by this Court, counsel for the respondent conceded that enough was alleged in the appellant's pleadings to support claims for contractual damages and that the elements necessary to sustain such claims had been the subject of sufficient investigation at the trial. For reasons stated later in this judgment that concession was undoubtedly justified.

[22] The enquiry, then, is whether the breaches alleged in the particulars of claim were proved and whether they resulted in the alleged damages. The learned Judge was alive to the need to consider contractual relief although the matter was not argued before him, and he dealt with it in his judgment. He considered that even if the action were construed as one for contractual damages the appellant had failed to establish that the department would have issued the permits in question to the appellant had the latter applied for their transfer. Accordingly, he found no causal connection between any breach and the alleged damages.

[23] In the circumstances the defences relevant to liability raised in the respondent's plea may be reshaped as follows:

(a) As regards claim A, such rights as the appellant acquired in respect of the TK permits were enforceable against the respondent once the moratorium was lifted in October 1992 but became unenforceable by reason of prescription when, in the

ensuing three years, the appellant failed to take steps to enforce them. Accordingly, when they were disposed of to Striker the respondent was no longer under any obligation to transfer them to the appellant.

(b) As regards claim B, there was no agreement that the Renata permits were returnable to the appellant on demand; therefore, upon transfer from the "Renata" they became and remained Robberg's property.

(c) In respect of both claims, the appellant failed to prove that the department would have issued the permits to the appellant had the necessary application for such issue been made.

[24] The respondent neither gave nor led any evidence. The issues referred to must be resolved on the testimony for the appellant.

[25] Taking first the defence designated (a) above, the reason for the TK permits remaining in Robberg's name was explained in the evidence of Robert Cowie, who was at all material times in control of the appellant's accounting function. He said that in 1985, when Robberg sold the TK, the partnership took the respondent on as "shore skipper". He remained in that position until 1988 when he decided to emigrate. He subsequently returned from abroad and on 30 June 1990 was engaged (now by the appellant) as fleet manager. He resigned from that post on 30 April 1995. Throughout his employment with the partnership and the appellant it was agreed between them that instead of his being paid a salary for his services Robberg would receive a commission. Robberg had an assessed loss against which the respondent caused the commission to be offset, ostensibly as income form fishing. In that way the sum paid would not be reduced by the deduction of the employee's tax which it would have been had he

received a salary and the assessed loss could be used to his advantage. This arrangement was allegedly agreed to by the Receiver of Revenue and in support of the respondent's representations to the Receiver that Robberg was earning an income from fishing it was agreed by the parties to keep Robberg on record as the owner of the TK and the holder of the TK permits. In this connection Mr Cowie's evidence was as follows:

> "I discussed the licence issue with him, said when are we taking transfer, when can we do the transfer of the licences. He asked me at the time to please delay taking transfer of the licences as he was operating a fishing company. The only asset of the company was the fishing vessel TK and if I took the licence away it would create financial problems for him."

(Whether the Receiver was misled, and what legal consequences followed, was not issued in this case. Subject to prescription, the TK permits were due to the appellant in any event.)

[26] In the contractual relationship which prevailed it was necessarily implicit, in my view, that Robberg was entitled to have the permits in its name until such time as the appellant demanded transfer. In the circumstances such demand would not be made while the respondent was in the appellant's employ.

[27] This is unlike the case of a monetary loan repayable on demand where, given the unidentifiable nature of money, it is not the same money that has to be repaid and it matters not what the debtor has done with the money. What has to be repaid (as far as capital is concerned) is simply a sum in the amount that was lent, which sum is owing from the time of the loan. There is therefore every reason to accept, as held in *Nicholl v Nicholl* 1916 TPD 10 (to which counsel were referred during argument), that in that situation prescription runs from the date on which the debt arises and not from the date of demand. Demand would not be necessary, in the absence of a contrary provision, to place the debtor in *mora* so as to

complete the creditor's cause of action.

[28] Here, however, what the appellant conceded to Robberg was the right to have specific assets, being the TK permits, registered in the latter's name. This was a loan for a limited use. Because Robberg obviously could not restore assets other than those lent, it had to have undisturbed use until demand was made. Prior to demand there could have been no liability to restore. It follows that Robberg could not have been in *mora* until, at the earliest, demand was made. In other words demand, whether orally or by letter or by summons, was an essential element of a claim for transfer and had to have occurred in order for the appellant to have acquired a complete cause of action. (A cause of action is the entire set of facts which a plaintiff must prove in order to succeed: *Evins v Shield Insurance Co Ltd* 1980 (2) SA 814 (A) at 838G.) Demand is essential to the cause of action for recovery of an amount of money repayable on demand where demand is a condition precedent to liability: *Mahomed v Nagdee* 1952 (1) SA 410 (A) at 418H - *in fine*. No reason suggests itself why the position differs where, as here, what is sought to be recovered is specific property. And until the appellant's cause of action was complete pursuant to demand, prescription did not run because the debt (being the obligation to transfer the licences) was not yet due: *HMBMP Properties (Pty) Ltd v King* 1981 (1) SA 906 (N) at 910A.

[29] Although not liable to transfer the licences to the appellant before demand, Robberg plainly had no right to transfer them to anyone else. If it was not yet time to transfer them to the appellant, Robberg was obliged to keep the TK permits registered in its own name. It is consistent with the existence of that obligation and the respondent's knowledge of it that, after leaving the appellant's employ in 1995, he wrote a letter dated 12 June 1995, with reference to the TK permits, confirming a discussion with one Barney Rose on behalf of the appellant, to the effect, *inter alia*,

> "The matter with regard to the retainment and possession of my six man fishing licence and squid permit currently on the vessel TK would be rediscussed with Squid Packers."

After that there was never an agreement altering the respondent's obligation to transfer the TK permits. Consequently, that obligation still existed when the disposal to Striker occurred. The obligation was breached.

Defence (a) must therefore fail.

[30] Turning to defence (b), concerning the Renata permits, the learned trial Judge held that the appellant failed to prove the alleged agreement that these permits were the property of the appellant and transferable on demand. Essentially, he held against the appellant on the narrow basis that there was an allegation in the particulars of claim that the agreement alleged was concluded on behalf of the appellant by Barney Rose and that the latter denied such an agreement when he gave evidence. It seems to me, however, that one has to have regard to the picture presented by the evidence as a whole.

[31] From the time of the 1985 agreement the TK was used by the partnership, and later by the appellant, for catching squid for their own account. That was despite the subsequent re-sale of the boat to Robberg. As mentioned, Robberg did not pay the re-purchase price and the vessel remained the property of the partnership and became the property of the appellant. After the respondent left the appellant's employ the latter took steps to have the boat transferred into its name. The Renata permits attached to the TK from some time in 1990 onwards and were used in tandem with the TK permits. These circumstances attract the inference that in the minds of the parties concerned all the permits, at least from 1990, were the property of the appellant in all respects save for their being issued in its name.

[32] The conclusion that the Renata permits were the appellant's property is strengthened when regard be had to the respondent's letter dated 12 June 1995 which I have already mentioned. He laid no claim to them. Had they been Robberg's property he would certainly have done so. They were just as much "currently on the vessel TK". And if he had regarded them on the same footing as the other six permits he would surely have been concerned to have them included in the "rediscussion". They are not referred to at all. It is as if entitlement to them was, in his view, beyond

debate. And, on the facts, the letter cannot be explicable on the basis that he knew that they were beyond question Robberg's. He gave no evidence to support that interpretation.

[33] Then there is the consideration that these two permits emanated, as it were, from the appellant in the first place. When they were transferred from the "Renata" they were assigned to the TK which was also the appellant's property. The reason for the TK and all the permits being in Robberg's name was to accommodate the respondent's income tax affairs as long as he was the appellant's employee. There was no other reason for the licences being in Robberg's name and no possible basis, on the evidence, for their being Robberg's property. All the licences were paid for throughout by either the partnership or the appellant and only the appellant utilised them.

[34] The evidence was therefore wholly sufficient to support an allegation that there was a tacit agreement between the appellant and Robberg (represented by the respondent) that despite registration in Robberg's name the Renata permits were the appellant's and that the latter was entitled to their transfer consequent upon demand. Accordingly the matter can be properly approached as if the necessary allegations had been made in the pleadings.

[35] As in the case of the TK permits, Robberg's obligation to effect transfer pursuant to demand still existed when the sale to Striker occurred. It follows that defence (b) must also fail.

[36] The appellant having established breach of contract in respect of both claims, I turn to defence (c). Counsel for the appellant conceded, rightly, that the *onus* was on his client to establish a causative connection between the breach and the alleged damages. This involved showing, so he accepted, that it was probable that the department would have approved issue of all the permits to the appellant. In the view of the trial Court this aspect had been neither pleaded nor proved. I shall deal with proof in due course. As far as pleading is concerned, however, it is generally accepted practice in damages actions, whether contractual or delictual, for a plaintiff to allege that its damages were caused "as a result" of the defendant's alleged breach or wrong and for the defendant to deny the allegation or place it in issue. It was not contended on the respondent's behalf that the present issue was not one justiciable on the pleadings. Nor, in my view, could that have been successfully argued. The real question is whether the onus on the issue was discharged.

[37] The trial Judge considered that it emerged from the evidence that it was departmental policy to favour small businesses in the squid catching

industry, hence the moratorium in respect of permit transfers which was aimed at preventing large businesses buying up permits and excluding smaller competitors. For this reason it was uncertain, so he held, if departmental approval would have been forthcoming if the appellant had sought the issue to it of the permits concerned. This was the only reason upon which the Court decided that the onus was not discharged.

[38] The starting point in this regard must be, in my view, that in deciding what the department would have done it is probable that it would have acted reasonably: cf *Carmichele v Minister of Safety and Security and Another* 2001 (4) SA 938 (CC) at 969 par [76].

[39] The high-water mark reached by the evidence as to the department's attitude in this connection consisted of remarks by Mr Cowie to the effect that, from his knowledge, the Minister responsible for sea fisheries had wanted to avoid what had apparently happened in the hake industry and had therefore ordered the moratorium for the reasons summarised by the learned Judge. Mr Cowie, of course, had no personal knowledge of how permit applications were decided and he readily conceded that on a number of occasions while testifying.

[40] The witness who would have known if there was indeed such a policy and more especially if it existed after the moratorium had been lifted in October 1992, was Robin Bodenham who, from 1990, was a senior administrative officer in the department whose responsibility portfolio included the management of squid resources.

[41] Mr Bodenham said that although a permit was issued to an individual or a company the emphasis all along in deciding whether to grant it was on two things: the catch rate of the vessel in respect of which the permit was sought and ownership of the vessel by the permit applicant. Referred to a condition printed on squid permits under the 1973 Act (which condition continued to apply under the 1988 Act as far as he knew) that no interest in a permit could be alienated without prior written approval of the Director-General, Mr Bodenham indicated that there was no fixed approach to dealing with such breaches. He did not distinguish between the case where a permit transfer was applied for and the case where, pursuant to an alienation no such application was made. The department, he said, simply treated each case on its merits in deciding whether to condone the breach. This was an appropriate context in which, if there was a policy such as the trial Court found to have existed, such policy would have played a role. Mr Bodenham made no mention of it and it was not canvassed with him in cross-examination. And assuming in the respondent's favour that there was, during the moratorium years, a departmental bias in favour of

small businesses when it came to permit issuance, there is nothing in the evidence to suggest that it continued to exist after 1992.

[42] Continuing with Mr Bodenham's evidence, he was asked whether failure to obtain the Director-General's approval before alienation of a boat or permit ever resulted in the permit's revocation. He knew of no such instance. On the contrary, he said, the department would request submission of the matter for the necessary approval so that the position could become "legalised" before rights would be allocated to the purchaser by the department.

[43] Among the exhibits forming part of the record are sundry departmental documents consisting of Interim Quota Board minutes and directives bearing various dates between 1986 and 1990. If these have any evidential value (which is by no means clear) anything they contain which is ostensibly inimical to the appellant's success was not shown to pertain to the department's approach as at 1995 or 1996 when the appellant could, but for Robberg's breach, have applied for the issue to it of the eight permits in question. In my view, in the circumstances, the evidence does not establish, or even suggest, that there was in those years a departmental policy or approach which would have tended to place the appellant at a disadvantage had it made such application.

[44] On the basic assumption stated earlier that the department would have acted reasonably, it would, had it looked into the history at all, have borne in mind that the TK and the permits had been used by the appellant or its predecessor for the preceding ten or so years; that they had always paid the necessary fees and levies and that the vessel's performance record was fully documented and sufficiently successful. The department would also have taken into account, I think, that the omission to regularise the boat and permit transfers timeously was not due to any intention to secure an undue advantage in the industry. Purchaser and seller were both established participants in 1985. No reason suggests itself why departmental approval would have been refused then. And given the appellant's standing and record there is no reason to think it would have been looked at askance in 1995 or 1996. In cross-examination it was suggested to Mr Bodenham that the department was intentionally misled all along into thinking that it was Robberg that was using the TK and the permits. Accepting that the true position was not spelt out to the department, the evidence reveals nevertheless a number of instances of payments of levies and licences where the party paying was plainly the appellant, not Robberg.

[45] The likelihood is in any event, in my view, that if the appellant had applied for the boat and permit transfers in 1995 or 1996 all that the

department would have been concerned about would have been whether the appellant owned the TK, whether the appellant had a satisfactory performance record and whether it was up to date with its dues. I think, on the evidence, that the department would have arrived at affirmative answers to all three questions and have granted the application. Defence (c) must therefore also fall away and it follows that the appellant was entitled to damages.

[46] On the matter of quantum, counsel for the respondent submitted that the permits were not proved to have had any greater value than the sum of R15 000.00 per permit for which they were sold to Striker. True, they were sold at that price at a time later than the date of breach but nothing in the evidence or in argument suggests that their value would have been different at the earlier stage and no point was made of this. Counsel for the appellant conceded that R15 000.00 per permit would be a fair assessment of their value. In the light of the distinct uncertainty created by the evidence on this score the concession was wisely made. Robberg was therefore liable to the appellant in the sum of R120 000.00 and the respondent is accordingly also so liable. The appeal must consequently succeed.

[47] It remains to mention that the record in this case was filed out of time. It was accordingly necessary for the appellant to apply for condonation. The application was contested. From the correspondence annexed to the unduly prolix affidavits of the respective parties it is clear that the failure to file the record in time was due to the appellant's Port Elizabeth attorney's mistaken view of the relevant Rule of this Court regarding the nature and implications of the obligation to prepare the record. In the circumstances of this case it was his sole responsibility. However, he thought he was entitled to enlist the assistance of the respondent's attorney and during prolonged and eventually unsuccessful attempts to secure such help the allotted time expired.

[48] The drawback of a less than satisfactory explanation for an applicant's default can, on ample authority, be outweighed by the advantage of its having a strong case on the merits. Counsel agreed that the fate of the application depended entirely on the fate of the appeal. The application must therefore succeed. The costs of it on an unopposed basis must obviously be borne by the appellant. The costs of opposition must also be paid by the appellant, whose counsel rightly conceded that the opposition could not be found to have been unreasonable.

[49] The order of this Court is therefore the following:

1. The application for condonation is granted, the costs of which are to

be paid by the appellant, including the costs of opposition.

2. The appeal is allowed, with costs.

3. The order of the trial Court is set aside and for it is substituted the following:

"Judgment is granted against the defendant who is ordered to pay the plaintiff

1. Damages in the sum of R120 000.00."

2. Interest on R120 000.00 at the prescribed rate from 25 June 1996 to date of payment.

3. Costs of suit."

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CT HOWIE
JUDGE OF APPEAL
CONCURRED:

SCHUTZ JA
MPATI JA
NUGENT JA
HEHER AJA