THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case no**:** 251/09

In the matter between:

AMI FORWARDING (PTY) LIMITED
Appellant

and

GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA (DEPARTMENT OF CUSTOMS AND EXCISE) First Respondent

STANDARD GENERAL INSURANCE COMPANY LIMITED Second Respondent

Neutral citation: **AMI Forwarding (Pty) Ltd v SARS and another (251/09) [2010] ZASCA 62 (3 May 2010)**

Coram: Mthiyane, Lewis, Bosielo and Leach JJA and Griesel AJA

Heard: **15 March 2010**

Delivered: **3 May 2010**
Corrected: **3 May 2010**

Summary: Liability under ss 18 and 18A of the Customs and Excise Act 91 of 1964: whether clearing and forwarding agent had proved that it was not liable for payment of duties.

ORDER

On appeal from: KwaZulu-Natal High Court (Durban) (Hassim J sitting as court of first instance):

1 The appeal is upheld with costs including those of two counsel where so employed.
2 The order of the high court is replaced with the following:
'(a) The plaintiff is not liable to pay to the first defendant any of the customs duties and other charges reflected in Annexure B to the particulars of claim.
(b) The first defendant is to pay the costs including those occasioned by the employment of two counsel.'

JUDGMENT

LEWIS JA (Mthiyane, Bosielo and Leach JJA and Griesel AJA concurring)

[1] The appellant, AMI Forwarding (Pty) Ltd (AMI), was a clearing and forwarding agent for the import and export of goods from South Africa. It was a subsidiary of a company based in Antwerp, Belgium. This appeal concerns its liability for duties on goods cleared by it for export in bond or export in transit over the period from November 1990 to May 1998. It ceased its business operations in South Africa in the middle of 1998.

[2] In October 2000 the first respondent, the Commissioner[1] for the South African Revenue Service (SARS) (cited in this matter as the Government of the Republic of South Africa (Department of Customs and Excise)) demanded that AMI pay duties in the sum of R331 352.84 in respect of three bills of entry

[1] At certain stages the Controller (the person designated by the Commissioner in an area) made the demands. I shall refer to the Commissioner, however, since he bore ultimate responsibility and the Customs and Excise Act 91 of 1964 varies from year to year in respect of references to the Controller or to the Commissioner.

listed in a schedule to the demand. The basis of this demand was that the bills of entry had been falsely acquitted. I shall deal with this demand in respect of the allegedly false acquittals last.

[3] In May 2001 SARS made a second demand for payment in the sum of R11 488 613.16 in respect of 68 bills of entry listed in an attached schedule, alleging that the bills of entry in respect of the goods in question had not been acquitted. In October 2002 a third demand was made, but this time it was in respect of 49 bills listed in the second demand, an employee of SARS having found the acquittals in respect of 19 of the bills of entry referred to in the second demand. The schedule to the third demand constitutes Annexure B to the particulars of claim. The reduced amount claimed was R5 903599.96 and related to transactions concluded during the period 15 September 1995 to 11 September 1996.

[4] AMI maintained that all the bills of entry in the second demand had indeed been acquitted. But it could not locate the acquittal documents years later, in part because it had merged with another company, Micor Shipping, and premises had been changed and documents lost, and partly because it had ceased trading in South Africa and documents had been destroyed. A third factor was that AMI had been in regular contact with SARS officials about outstanding duties, and had handed much of its documentation to its attorney, who had absconded at the time when the demands in issue were made.

[5] AMI had given as security for its statutory obligations (which I shall discuss later) three bonds: a general bond, number 210724, in the sum of R10 000, dated 17 May 1991; a special removal bond, number 202906, in the sum of R375 000, dated 17 May 1991 (for the removal in bond of goods outside of South Africa); and a special removal bond, number 202907 in the sum of R2m. This also secured payment of duties in respect of the removal of goods from Durban Harbour, or from SA Container Depots, by road to a destination outside South Africa.

[6] In March 2003 AMI instituted action for an order declaring that it was not liable to pay SARS any of the customs duties demanded. These were in respect of the allegedly falsified acquittals and the bills of entry which were the subject of the third demand. It also sought an order that SARS was not entitled to call up payment against any of the bonds furnished by it, and guaranteed by the second respondent, Standard General Insurance Company Ltd. (The latter did not defend the action since its obligations are dependent on the liability of AMI.) SARS defended the action, but gave an undertaking to

AMI that it would not draw down on the bonds pending the finalization of the action.

[7] The action was dismissed by the KwaZulu-Natal High Court, Durban, Hassim AJ finding that AMI had not proved that it had acquitted the bills of entry in respect of the third demand, and that the acquittals forming the basis of the first demand had been falsified. She gave AMI leave to appeal to this court.

[8] Numerous issues were traversed in the pleadings, the evidence, the judgment of the high court and in heads of argument. I shall allude to them briefly. But at the hearing of the appeal counsel for AMI abandoned one of the legal arguments which it had relied on in the high court and argued the matter principally on the basis of inferences to be drawn from the facts proved.

[9] Liability for the payment of customs duty is imposed on a clearing agent such as AMI by ss 18 and 18A of the Customs and Excise Act 91 of 1964. Both sections were amended with effect from 1 January 1996. The claims by SARS are thus governed by both the original and the amended provisions. The relevant provisions at the time are set out below (I shall put words deleted by the 1995 amendment in square brackets, underline words added by the amendment and italicise words for emphasis).

[10] '18 Removal of goods in bond—(1) Notwithstanding anything to the contrary in this Act contained –

(a) the importer or owner of any imported goods landed in the Republic or the manufacturer, owner, seller or purchaser of any excisable goods or fuel levy goods manufactured in a customs and excise warehouse <u>or the licensee of a customs and excise warehouse</u> in which dutiable goods are manufactured or stored may remove such goods in bond to any place in the Republic appointed as a place of entry or warehousing place under this Act or to any place outside the Republic: Provided that such goods manufactured or stored in a customs and excise warehouse may only be so removed to any such warehousing place in the Republic or any place in a territory in the common customs area approved by the government of that territory for rewarehousing at that place in another customs and excise warehouse;

. . . .

(2) In addition to any liability for duty incurred by any person under any other provision of this Act, *the person who removes any goods in bond in terms of*

subsection (1) shall, subject to the provisions of subsection (3), be liable for the duty on all goods which he so removes.

(3) Subject to the provisions of subsection (4), any liability for duty in terms of subsection (2) shall cease *when it is proved* [to the satisfaction of the Commissioner] *by the person concerned –*
(a) in the case of goods removed to a place in the common customs area, that such goods have been duly entered at that place; or

(b) in the case of goods which were destined for a place beyond the borders of the common customs area, that such goods have been duly taken out of that area.
(4) If the person concerned fails to submit any such proof as is referred to in subsection (3) [within a period of thirty days from the date on which the goods in question were entered for removal in bond] within a period as may be prescribed by rule, he shall upon demand by the [Commissioner] Controller forthwith pay the duty due on such goods.

(5) No goods shall be removed in bond in terms of this section from the place where they were landed in the Republic or where they entered the Republic until they have been entered for removal in bond and such entry shall be deemed to be due entry in respect of such goods at that place for the purposes of this Act.
(6) No entry for removal in bond shall be tendered by or may be accepted from a person who has not furnished such security as the Commissioner may require and the Commissioner may at any time require that the form, nature or amount of such security shall be altered in such manner as he may determine.'

[11] The relevant provisions of s 18A are:
'Exportation of goods from customs and excise warehouse – (1) Notwithstanding any liability for duty incurred thereby by any person in terms of any other provision of this Act, any person who exports any goods from a customs and excise warehouse to any place outside the common customs area shall, subject to the provisions of subsection (2), be liable for the duty on all goods which he so exports.

(2) Subject to the provisions of subsection (3), any liability for duty in terms of sub-section (1) shall cease when it is proved [to the satisfaction of the Commissioner] by the exporter that the said goods have been duly taken out of the common customs area.

(3) If the exporter fails to submit any such proof as is referred to in subsection (2) within a period [of 30 days from the date on which the goods concerned were entered for export], as may be prescribed by rule he shall upon demand by the Controller [Commissioner] forthwith pay the duty due on those goods.
. . . .'

The principal effect of the 1995 amendments[2] to both ss 18 and 18A is that proof of removal does not have to be 'to the satisfaction of the Commissioner'.

[12] Both sections 18 and 18A impose liability on a clearing agent for importation and exportation unless it can prove that the goods concerned have been removed in bond or in transit. In *Standard General Insurance Company Ltd v Commissioner for Customs and Excise*[3] this court held that an agent is liable under s 18A, falling within the meaning of a person who exports. Equally, an agent would be liable under s 18 as an importer. AMI accepts that it incurs liability under both ss 18 and 18A. After the sections were amended in 1995 it was sufficient for it to have furnished to customs officials evidence of removal in bond or in transit in order to obtain acquittals: proof 'to the satisfaction of the Commissioner' was, as I have said, no longer necessary.

[13] AMI accordingly does not deny that it would have been liable for payment of the duties in question had the goods concerned not been removed in transit or in bond. Its case is that it did remove the goods, either in transit or in bond, and that it had provided proof of this to the relevant customs officials at the relevant times. Thus the thrust of the argument is that although AMI could no longer produce the proof the only inference to be drawn, on the probabilities, from a number of uncontroverted facts, is that it had once tendered the requisite proof and that SARS had accepted it at the time.

[14] Before turning to the facts on which AMI relies, I should indicate that in the high court AMI had argued that it did not bear the onus of proving that the bills of entry in question had been acquitted. (This was the argument abandoned on appeal.) Section 102(4) of the Act provides that in any dispute with the State as to whether duty has been paid, or goods imported or exported, 'it shall be presumed that such duty has not been paid or that such goods . . . have not been lawfully used, imported, exported . . .'. AMI argued that the 'reverse onus' imposed on it was unconstitutional, particularly in the light of the provisions of s 101 (read with rule 101.01) which require that business records and documents need be retained for inspection only for a period of two years.

[15] The high court rejected this argument. At the hearing of the appeal AMI accepted the validity of s 102(4) and conceded that it bore the onus of proving that the bills of entry in question had been acquitted. It argued also that the claims of SARS had prescribed and that the decision to make the demands

[2] By Act 45 of 1995.

[3] 2005 (2) SA 166 (SCA).

amounted to unfair administrative action given the circumstances and delays attendant on the demands. It is necessary to discuss these two arguments only if AMI's contention that it had proved acquittals in the past is unsuccessful.

[16] I turn then to the facts. AMI acted as a clearing agent for the import and export of goods. It attended to both the removal of goods in bond – that is, removal from one customs warehouse to another in the common customs area – and to removal in transit, by road or rail, to a destination outside the common customs union. It would give guarantees – bonds – to serve as security for the payment of duties if goods were not exported (sent out of the common customs area) and removal-in-transit bonds to secure payment in respect of goods being sent out of the area.

[17] Before goods were removed in transit it would complete a form DA 570, with the purpose code 'RIT'. Where goods were removed to a bonded warehouse within the area, the DA 570 would bear the purpose code 'RIB'. Where it attended to the export of goods to a destination outside the common customs area AMI would complete a form DA 26.

[18] Mr A Caban, the manager in Africa of AMI for 34 years (and previously a customs officer in Zambia) before his retirement in 2003, gave evidence about the business of AMI. He was not ever in charge of the South African operations but was in a position to describe the pattern of transactions and the way in which goods were cleared through customs. AMI's main function was to see to the transit of cargo from ports, primarily Durban, to landlocked countries in Africa. Caban testified that the AMI group of companies had a good reputation internationally, in the industry; that they had a good client base and that they always attempted to comply with the customs laws of the countries in which they worked.

[19] Caban came to South Africa in 1998 when AMI ceased to trade here in order to tidy up loose ends. He was also looking for a partner for AMI, which he found in Micor Shipping. A joint venture company was formed – AMI Micor. All documentation in the possession of the former AMI offices in Durban were transferred to the AMI Micor offices in Johannesburg. When the dispute arose with SARS he had attempted to locate the bills of entry in contention but many documents had disappeared in the move. He did, however, find two registers. One was in respect of bills of entry, where dates, reference numbers, file numbers, bills of entry numbers, the importer of the goods and the date when the bill was acquitted were all reflected. The acquittals were recorded with red stamps made by the customs authorities together with signatures or initials of the customs official. The register was handed in as an exhibit. It covers the period from November 1990 until May 1998. Caban said there was a

possibility that there were other bills of entry registers used at that time.

[20] The second register found, also handed in as an exhibit, was in respect of the special removal bond number 202907 dated 19 November 1993. Caban explained that the bond was given as security for removing goods. When they were cleared they had a value on which customs duty was payable. Caban described this as a notional amount – a penal sum – calculated on the value of the cargo and VAT on that sum too. Goods could be removed only if the penal sum was less than the value of the bond. Entry of a penal sum would reduce the value (the running balance) of the bond. If goods to be moved exceeded the running balance, so that the security would be exhausted, then the goods could not be removed. But when the acquittances from customs were received they would be entered as credits in the register.

[21] Thus each entry in the bond register reflected a bill of entry number, the importer, the name of the vessel that had brought the cargo into South Africa, the reference number, the amount of the penal sum, that of the penal sum credit, the running balance at the time and the date of each acquittal. The bond was for the sum of R2m. But at the end of August 1998 the running balance was in credit in the sum of R4 532 320. Caban said that the conclusion to be drawn from the fact of the large credit was that all RIT entries (DA 570 forms) had been acquitted and all duties had been paid.

[22] This evidence was not countered by any witness for SARS. The official who had confirmed the credit balance was not called as a witness, and there was no indication that the official was unavailable. Mrs Vera Burger, who testified for SARS in relation to customs duties collection procedures and AMI's documentation, confirmed that unless customs officials were satisfied that the bills of entry had been acquitted they would not enter a credit in the bond book. Any discrepancy between the acquittal register and the bond register could be explained by the lapse of time between the date of the actual acquittal and the date when it was entered in the bond book.

[23] It was the bond book that was regarded by Caban as the proper proof of acquittal: without the credit entries AMI would exceed the amount of the bond and not be able to remove goods in transit. That the bond book was regarded as the basis for proving acquittal was also confirmed by another SARS witness, Mr B G Makhatini, who said that after the dispute arose he had repeatedly asked Caban for the bond books.

[24] The loss of documents was attributable not only to AMI but also to SARS. It did not have any records of non-acquittals. SARS records were, by the admission of its own witnesses, in a state of chaos. This was in part due to the moratorium (from 1998 to 2002) on the collection of duties put in place by

SARS when an appeal against a court decision was pending. Once the decision on appeal had been handed down SARS established what it called a ‘war room’ to hunt down unpaid duties. They enlisted the aid of numerous officials to clean out the backlogs. They drew up lists of unacquitted entries and sorted them out in ‘agent order’. Burger conceded that many documents, including acquitted bills of entry, could not be located. Yet some of these had been entered in the bond book and some, Burger conceded, would have been entered in previous bond books.

[25] Mr D A Mooney, an employee of AMI, also said that SARS’s record-keeping was deficient. While unable to testify about the bills of entry in issue, he did give evidence about the inability of SARS, particularly the officials at Beit Bridge and Durban, to keep track of acquittals. He estimated that when SARS queried what it thought were outstanding acquittals, in 90 per cent of cases the acquittals had already been given and recorded in the agent’s register. The weight of his evidence was attacked by SARS on the basis that it was no more than similar fact evidence. But it was borne out by the evidence of Burger and other SARS officials.

[26] Most importantly, Makhatini, who was one of the SARS officials who had worked in the ‘war room’, was able to find 19 acquittals in between the sending of the second demand and the third, which he drafted – hence the demand for less than half of what was claimed in the second demand. This fact alone shows the parlous state of record-keeping by SARS as also the failure by SARS officials to make proper checks before making demands.

[27] Furthermore, during the course of the trial yet another eight acquittals were shown to have been made. This emerged from the evidence of Professor Harvey Wainer, a chartered accountant and Visiting Professor at the University of the Witwatersrand, who was engaged by SARS to analyse the records. He had worked on AMI’s acquittance register. Wainer conceded that there could justifiably be discrepancies between dates of bills of entry and their dates of acquittal: that was the case with a further five bills that appeared to have been acquitted.

[28] AMI thus contends that, although, through no fault of its own, it can no longer tender proof of acquittals in respect of which the claims for duty were made, it had proved that it had done so at the relevant times. This proposition is based on a number of objective factors which show, cumulatively, and on a balance of probabilities, that no duties were payable and that SARS’s demands were not warranted. I have already dealt with the evidence on which the contention is based. But to summarize:

[29] First, there was the large credit in the bond book in August 1998 when

AMI ceased trading, and which a SARS official had confirmed by signature. Second, between the date of the second and third demands, Makhatini had found 19 acquittals, reducing the demand by almost 50 per cent. Third, it was established at the trial, when Wainer gave evidence, that there were another eight bills of entry that had been acquitted. The acquittals register, although incomplete, showed that most of the bills of entry in question had indeed been acquitted. And the bond book, which showed the large credit, reflected that there was sufficient security – the bills of entry having been acquitted – for AMI to continue to remove goods in bond or in transit. And lastly, the moratorium on demands between 1998 and 2002 resulted in chaos: thousands of bills of entry were being checked, and there were 300-400 clearing and forwarding agents whose records were being checked. Documents were admittedly lost. The SARS officials had clearly made mistakes.

[30] Moreover, as Caban testified – and this was not contested – AMI was a reputable clearing and forwarding agent which had at all times complied with the customs laws of the countries in which it operated. The only inference to be drawn from all these factors is that AMI had attended to the acquittal of all the bills of entry in question at the relevant times and had thus discharged the onus that it bore under s 18(3) of the Act.

[31] I conclude, thus, that AMI has proved that it had acquitted all the bills of entry referred to in the third demand, and is not liable for payment of the duties demanded.

[32] I turn then to the first demand, and the allegedly falsified acquittals. SARS contended that four bills of entry for removal in bond (DA 570s) were falsely acquitted. The basis for the allegation of falsification (which was not attributed to AMI) was that the stamps of the customs officials at the Beit Bridge border post on these bills did not conform with the stamps that were actually used. Much evidence was led on the shape of the stamps, and transparencies were produced to show what the genuine stamp should look like. I do not propose to deal with this evidence in any detail. The testimony of Burger, and the SARS official at Beit Bridge, Mrs M Vorster, was inconsistent and Vorster contradicted herself in significant respects. It was conceded that she was an unsatisfactory witness. There was no evidence led as to who would have falsified the stamps. The transparencies and the stamps on the bills of entry concerned do not appear to differ in any significant way. They are all faint and smudged. And SARS was unable to produce a bill of entry with what it contended was the true stamp.

[33] Who bears the onus of proving the falsification? SARS contended that by virtue of s 102(4) AMI bore the onus of proving that the stamps were

genuine, even though it had raised fraud as a defence. But fraud is a special defence. The party who alleges fraud must plead and prove it: *Standard Bank v Du Plooy & another; Standard Bank v Coetzee & another*[4] and *Courtney-Clarke v Bassingthwaighte.*[5]

[34] In my view, once AMI had proved that it had removed the goods in bond or in transit under s 18(3), it discharged the onus that it bore – it disproved the assumption created by s 102(4). When SARS alleged fraud, which it did in the plea, it had to prove that the bills of entry had been falsely acquitted. I can see no reason why the onus of proving fraud should shift from SARS to AMI simply because s 102(4) creates an assumption of liability that AMI must disprove. Once AMI has proved acquittal the usual rule must apply: the fraud must be proved by the party making the allegation – SARS. That it did not do. There was no acceptable evidence adduced, either documentary or through the witnesses Burger and Vorster, that the stamps on the four bills of entry had been falsified. SARS could not claim duties in respect of those bills.

[35] I accordingly find that AMI has discharged the onus of proving that the bills of entry reflected in the annexure to the third demand had been acquitted and that it was not liable for the payment of duties claimed in the first demand and is consequently not liable on any of the bonds provided to SARS. The remaining arguments of AMI as to prescription and unfair administrative action thus fall away.

[36] (1) The appeal is upheld with costs including those of two counsel where so employed.
(2) The order of the high court is replaced with the following:
‘(a) The plaintiff is not liable to pay to the first defendant any of the customs duties and other charges reflected in Annexure B to the particulars of claim.
(b) The first defendant is to pay the costs of the action including those occasioned by the employment of two counsel.’

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C H Lewis

Judge of Appeal

[4] (1899) 16 SC 161 at 166.
[5] 1991 (1) SA 684 (Nm) at 689F-G. See also *Amler’s Precedents of Pleadings* 7 ed (2010) by L T C Harms p 215.

APPEARANCES

APPELLANT:	O Moosa SC
	(with him A Boulle)
	Instructed by Shepstone & Wylie, Durban
	Webbers, Bloemfontein
RESPONDENTS:	C J Pammenter SC (with him T Mukadam) Instructed by The State Attorney Durban The State Attorney Bloemfontein