MODZONE ENTERPRISES (PRIVATE) LIMITED
and
PAUL EDWARDS SHIPPING COMPANY (PRIVATE) LIMITED
versus
TRANSTECH FREIGHT ZIMBABWE (PRIVATE) LIMITED
(trading as UTI)

PATEL J
HARARE, 26-27 June 2006 and 24 September 2007

Civil Trial

Mr. Nhemwa, for the plaintiffs
Adv. Fitches, for the defendant

PATEL J: The plaintiffs in this case claim the sums of US$26,528.72 and ZAR43,534.80 as damages for breach of a contract of carriage entered into with the defendant in June 2001. The plaintiffs' claim is founded on the common law of carriage and, alternatively, on the negligent performance of the contract. The defendant disputes liability on both grounds.

At the commencement of trial, counsel for the plaintiffs conceded that the 2nd plaintiff was only acting as agent for the 1st plaintiff and therefore had no *locus standi* to sue as such. Accordingly, the matter proceeded on the basis that the 2nd plaintiff was not a proper claimant in this action.

The Evidence

Evidence for the plaintiffs was given by Edward Mutambanadzo, the Managing Director of the 2nd plaintiff, and by Courage Mandivenga who was employed by the 1st plaintiff at the relevant time as its imports and exports officer. The plaintiffs' case is that the defendant is a public carrier and was engaged by the 2nd plaintiff in June 2001 to transport the 1st plaintiff's consignment of fabric to its customers in Namibia. It was a term of the agreement that the goods were to be transported as one load in a container and to reach their destination in the early part of July 2001 safely and in good and merchantable condition. The 1st plaintiff loaded all

the fabric into a container. In Johannesburg, the defendant unlawfully removed the fabric from the container and split the load into two different consignments. The second consignment was mixed with highly flammable goods, i.e. paint and shade netting, and was loaded into a defective vehicle equipped with tyres that were unfit for the intended journey. In the event, the second consignment was destroyed by fire in Botswana and was never delivered to the destined customer. As a result, the plaintiff suffered damages, being the invoice value of the fabric that was burnt in transit.

Glen Davis, who is the Regional Manager of UTI in Central Africa, testified for the defendant. The defendant admits most of the uncontentious facts outlined above. Its defence is that the agreement between the parties was qualified by an express term that the fabric was being transported by the defendant at the 1st plaintiff's risk. The defendant also challenges its citation as a public carrier. In Johannesburg, it became necessary for practical reasons to split the original consignment into two. Furthermore, while it is accepted that the second consignment was destroyed in transit, the fire which caused the loss was not caused in any way by the defendant's conduct or omission.

Privity of Contract between 1st Plaintiff and Defendant

In its plea the defendant disputed the *locus standi* of the 2nd plaintiff, as a mere agent, to sue the defendant in this matter. This point was accepted by the plaintiffs at the commencement of trial and, as already indicated above, the matter proceeded with the 1st plaintiff as the only claimant in this action.

At the close of trial, counsel for the defendant submitted for the first time that even the 1st plaintiff had no cause of action against the defendant inasmuch as there was no *vinculum juris* between them constituting the requisite privity of contract entitling the 1st plaintiff to sue the defendant.

Having regard to the pleadings and the evidence before the Court, it is clear that defendant's objection in this regard cannot be sustained. The testimony of Mutambanadzo shows that the 1st plaintiff contracted the 2nd plaintiff to engage the defendant to ferry its fabric to Namibia. This was specifically mandated because the 2nd plaintiff did not operate the Namibian route while the defendant was known to the plaintiffs as the only transporter who plied that route. In effect, the 1st plaintiff instructed and authorised the 2nd plaintiff to hire the defendant not merely as the 2nd plaintiff's sub-agent or servant but specifically as the 1st plaintiff's agent to execute the mandate to ferry the 1st plaintiff's cargo. Therefore, the contract *in casu* was not a sub-contract *stricto sensu* but was intended in reality to be a contract between the 1st plaintiff and the defendant.

This position is indeed precisely what is reflected in the defendant's plea. In paragraph 4, the defendant admits: "*As 2nd Plaintiff was a mere agent, the contract was between Defendant and 1st Plaintiff. 2nd Plaintiff was not party thereto*". This is an unequivocal acceptance of the requisite *vinculum juris* between the 1st plaintiff and the defendant. The remainder of the defendant's plea affirms that linkage and contains nothing whatsoever to contradict it. This admission was never duly withdrawn and the defendant must be held to be bound by it – quite apart from the evidentiary finding made above.

Whether Defendant was a Public Carrier

In paragraph 3 of its plea, the defendant "*admits that it is in the business of carrying cargo [but] denies that it is a public carrier as alleged*". In denying its status as a public carrier, the defendant primarily relies on clause 2 of The Shipping and Forwarding Agents Association of Zimbabwe Standard Trading Conditions (the Standard Conditions) which states:

> "*The Company is not a common or public carrier. Its carriage of goods is merely incidental to its clearing and*

forwarding operations and it may refuse to accept for carriage any goods or class of goods."

According to Mutambanadzo's evidence, the defendant has a number of small trucks and hires larger trucks through transport brokerage. For this reason and because it plied the Namibian route, the defendant was contracted by the 2nd plaintiff to provide transport for the 1st plaintiff's shipment to Namibia. The 2nd plaintiff then hired a 40 ft. container and delivered it to the defendant. The goods were packed into the container at the 1st plaintiff's premises and then loaded on to a truck provided by the defendant. At that stage, the defendant did not indicate whether it had subcontracted the transportation to another carrier nor did it disclose the identity of any such carrier – either for the trip from Harare to Johannesburg or for the trip from Johannesburg to Namibia.

Dennis testified that the defendant contracted two different hauliers for the two journeys. However, apart from denying that the defendant was a public carrier, Dennis did not materially dispute the evidence of Mutambanadzo regarding the contract between the parties. He also accepted that the defendant was responsible for the entire haulage from Harare to Namibia and that as the principal it would ordinarily be liable for any negligence or breach of contract committed by the subcontracted hauliers.

In *Clan Transport Co (Pvt) Ltd v Mhishi* 1991 (2) ZLR 333 (SC) at 334, KORSAH JA held that:

> "The question whether a person is a common carrier or not is one of fact. A man may be a common carrier without so styling himself. Anyone who undertakes to carry the goods of all persons indifferently, for hire, is a common carrier. It is of no consequence that that carrier restricts his liability for the goods transported; that does not make him any the less a common carrier. *Cotton Marketing Board of Zimbabwe v National Railways of Zimbabwe* 1988 (1) ZLR 304 (SC)."

In similar vein, it was observed by CHIDYAUSIKU J in *Independence Mining (Pvt) Ltd v Fawcett Security Ops (Pvt) Ltd* 1994 (2) ZLR 222 (H) at 229-230:

> "For a party to be a public carrier, it is not necessary for that party to have as its main business the carriage of goods. When a party carries on the trade or profession of carriage of goods as part of its business, that is sufficient to make that party a public carrier. There is nothing in the authorities to suggest that a party has to have as its sole business the carriage of goods before it can be regarded as a public carrier."

On these authorities and having regard to the evidence before me, I am satisfied that the defendant is a public carrier and that it certainly acted as such in the performance of the contract *in casu*. Accordingly, its liability in the present context is to be determined by the common law rules governing the rights and obligations of a public carrier – as read with the contractual terms agreed by the parties.

Liability of Public Carrier

According to the Roman praetor's edict, a public carrier is absolutely liable to restore property received by him unless he can prove that the loss or damage was caused by *damnum fatale* or *vis major*. In Zimbabwe, there is no legislation laying down standard conditions for the carriage of goods by road and it is accepted that the edict applies to all carriers by land for reward. See *Cotton Marketing Board of Zimbabwe v National Railways of Zimbabwe* 1988 (1) ZLR 304 (SC) at 315; and see generally Christie: *Business Law in Zimbabwe* (1985) at pp. 181-192.

A public carrier is not liable if he can establish the defence of *damnum fatale* (unexpected and unavoidable accident) or *vis major* (superior force) or the negligence of the consignor or inherent fault or vice in the goods themselves. The carrier's liability commences from the moment he takes delivery of the goods and continues until he has discharged his contractual obligation, viz. to deliver the goods to the consignee at the agreed destination. Where the goods are lost or destroyed, the measure of damages payable by the

carrier will normally be the market value of the goods at their destination.

According to Christie, *op. cit.*, at p. 186, the carrier who accepts the goods from the consignor and agrees to deliver them at a particular destination is responsible for the goods throughout the whole journey. If the goods are lost or damaged, it is immaterial to the consignor that the fault lies with the original carrier or with another carrier to whom he has handed them over. Even if it is established that the fault lies with the subsequent carrier, the consignor is entitled to sue the original carrier on the ground that he contracted to deliver, personally or through the agency of the subsequent carrier, at the stipulated destination. As there is no privity of contract between the consignor and the subsequent carrier, the original contractor is obliged to compensate the consignor and is then entitled to recover from the subsequent carrier.

It is now standard practice for carriers to introduce special terms limiting their liability into their contracts, either specifically or by way of standard conditions. Special terms limiting the carrier's liability will be narrowly construed so as to give only that degree of exemption from liability that is expressly stated. Thus, a contract to carry "at owner's risk" does not absolve the carrier from all liability but only from liability for slight negligence, leaving him liable for definite or gross negligence. See *Mashonaland Railways Company v Gordon* 1921 SR 80; *Cotton Marketing Board of Zimbabwe v National Railways of Zimbabwe* 1988 (1) ZLR 304 (SC).

Terms of Agreement between the Parties

In terms of the defendant's quotation of the 27th of June 2001 [Exhibit 1] and its invoice dated the 29th of June 2001 [Exhibit 2], the defendant was to ferry the 1st plaintiff's textiles in a 40 ft. container from Harare to Namibia via Johannesburg. The cost of insurance was not included in the contract charges. More significantly, all goods

were to be "*carried, handled, loaded and off loaded at owners risk*" and the contract was subject to the defendant's Standard Conditions [Exhibit 16]. For present purposes, the salient exclusionary provisions of the Standard Conditions are as follows:

> Clause 16: "*The Company shall not be liable for loss of or damage to goods unless such loss or damage occurs whilst the goods are in the actual custody of the Company and under its actual control and unless such loss or damage is due to the wilful act of the Company or its own servants.*"
>
> Clause 17: "*The Company shall be entitled, in the absence of express instructions to the contrary, to employ independent third parties to perform all or any of the functions required of the Company. Where such parties are disclosed to its customer, the Company shall have no responsibility or liability to its customer for any act or omission of such third party …….. If the third party is not disclosed to its customer, then such third party shall, for the purpose of the Company's responsibility to its customer, be deemed to be a servant of the Company.*"

In the instant case, the combined effect of the relevant exclusionary provisions is this. Firstly, as per the authorities referred to above, the "owner's risk" clause operates to exonerate the defendant only in respect of negligence and not for its gross negligence. Moreover, as was held in *AMI Zimbabwe (Pvt) Ltd v Casalee Holdings (Successors) (Pvt) Ltd* 1997 (2) ZLR 77 (S) at 85, it is not possible for the parties to an agreement to contract out of liability for gross negligence. In this context, the reference to "wilful act" must be similarly construed to include liability for any wilful default or gross negligence on the part of the defendant.

Secondly, it is common cause that the identity of the actual hauliers in this case was not disclosed to the plaintiffs when the contract was concluded or during the course of carriage of the goods in question. That being so, the defendant remains contractually responsible for any act or omission of those hauliers, who are "deemed" to be the defendant's servants for the purposes of any liability towards the 1st plaintiff. In any event, even if the hauliers had been disclosed to the plaintiffs, this would not enable

the defendant to escape liability for the wilful conduct or gross negligence of its agents. See *Tubbs (Pvt) Ltd v Mwamuka* 1996 (2) ZLR 27 (S) at 32, where GUBBAY CJ held:

> "A party cannot exempt himself from liability for the wilful misconduct or criminal or dishonest activity, of himself, his servants or agents; or perhaps, even from the loss of or damage to the *merx* resulting from gross negligence on his or their part."

To conclude on this aspect, the exclusionary clauses *in casu* do not exonerate the defendant from all liability in respect of the contract of carriage between the parties. The defendant remains liable not only for its own wilful acts or gross negligence but also for the wilful misconduct or gross negligence of the hauliers contracted by it to ferry the 1st plaintiff's cargo.

Validity of Exclusion Clauses

Having regard to the view that I have taken of the exclusionary clauses in this case and their narrow construction limiting the scope of their application to the facts herein, I deem it unnecessary for present purposes to determine their validity or enforceability under the Consumer Contracts Act [*Chapter 8:03*].

Burden of Proof

Ordinarily, the burden of establishing a valid defence under a contract of carriage rests upon the carrier himself. Seemingly to the contrary, it was stated in the *Tubbs* case, *supra*, at 32:

> "Where the existence of an "owners risk" clause excluding liability for negligence is not in dispute, the burden of establishing any other possible ground of liability, such as gross negligence or *dolus*, rests upon the claimant. See *King's Car Hire (Pty) Ltd v Wakeling* 1970 (4) SA 640 (N) at 643B; *Stocks & Stocks (Pty) Ltd v T J Daly & Son (Pty) Ltd* 1979 (3) SA 754 (A) at 760E-F."

It seems reasonably clear, however, that this *dictum* was made in the context of contracts generally and does not extend to

the special situation of public carriers. As was stated by KORSAH JA in *Mhishi's* case, *supra*, at 336-337:

> "A salutary effect of the strict liability for damages to, or loss of, the goods which the Edict imposes on common carriers is that it places the onus on the carrier to prove that: 'the loss was due to *vis major* or to *damnum fatale*, to inherent vice in the goods or to the negligence of the owner of the goods.' (See *Pohoomull Brothers v Rhodesia Railways* 1921 SR 88.)
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> There is no onus on the consignor of goods who brings an action for damages against the carrier to prove how the goods were damaged, lost or destroyed. After all, he would not be present during the course of the journey and it would be placing an intolerable burden on him to require of him proof of what he cannot possibly know. All he can do is to establish that he handed over the goods in an undamaged condition and that they were damaged when he received them back.
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> ..... As the definition of "owner's risk" specifically exempts the appellant from certain types of negligence, effect must be given to that exemption or exclusionary clause, but only after ascertaining its meaning, like any other clause in a contract, having regard to the nature and purpose of the contract, and the context within which the words were used.
>
> To begin with, to the extent that the exclusionary clause attempts to shift the onus of proving negligence onto the consignee it is bad in law. The rules of evidence are based on considerations of fairness and experience. It is the court that determines the party upon whom the burden of proof lies. The parties cannot by their contract deprive the court of this responsibility. They may contract out of liability for negligence, but not out of the rules of evidence by which negligence may be established.
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> The burden of proof, in the sense of the risk of non-persuasion, may be taken from the pleader desiring action and placed upon the opponent. Common sense and experience have dictated that the burden of proving a fact is on the party who is presumed to be possessed of the peculiar means of knowledge enabling him to prove its falsity, if it is false. In the instant case, the damage to the materials occurred when they were in the possession of the appellant. The respondent was not present when such damage was occasioned. The appellant, and the appellant alone, is the party who presumably has peculiar means of knowledge enabling it to prove whether the damage occurred as a direct consequence of the wilful misconduct or gross negligence of its servant, agents or sub-contractors."

Breach of Contract and/or Gross Negligence

Turning to the facts *in casu*, the 1st plaintiff's cargo was conveyed intact in the 40 ft. container from Harare to Johannesburg where it was split into two separate consignments at the instance of the second haulier, Transworld Roadfreight (Pty) Ltd. The seal placed on the original container was presumably removed in Johannesburg. The second consignment was mixed with other goods and placed in a fibre glass container. It was then damaged en route to Namibia. According to the report furnished by the second haulier [Exhibit 5]:

> "*While driving along the driver heard a tyre burst so he pulled over. He saw that the tyres on the passenger side of the middle axle were burning. The inner tyre had come off the rim and moved on to the axle housing under the trailer. He tried to drive slowly but the axle started coming out of the housing which prohibited him from driving any further. He and another driver which (sic) had stopped to assist tried in vain to extinguish the fire. The main problem was the tyre burning on the axle did not allow them to get close enough to one under the trailer.*
>
> *The tyre eventually set the glass fibre box alight. By this time the police from Kalkfontein had arrived on the scene and also attempted to extinguish the fire to no avail. They then off hooked the front runner and took that a safe distance from the burning trailer to ensure that that and the truck tractor did not burn as well. There was paint as well as shade netting in the load and once these took it was impossible to stop the fire. ..... The entire 12m box of freight burnt out as per attached photographs.*"

As regards breach of contract, it is submitted for the plaintiffs that the removal of the seal from the original container and the transhipment of the goods into two smaller containers constituted a fundamental breach of contract resulting in the loss sustained by the 1st plaintiff. I am unable to agree. The purpose of placing a seal on the original container was to ensure that the consignment in question was identifiable throughout its journey and upon arrival at its eventual destination. The mere removal of the seal was not, in my view, a fundamental breach of contract nor did it result in the

destruction of the second consignment. By the same token, it cannot be said that the placement of this consignment into a smaller container constituted a fundamental breach of contract or in itself caused the destruction of the goods in question. There is simply no causal nexus between the removal of the seal or the reloading of the goods on the one hand and their eventual destruction by fire on the other.

Turning to the question of negligence, has the defendant discharged the onus upon it to show that the 1st plaintiff's goods were destroyed in circumstances which did not amount to wilful misconduct or gross negligence either on its part or on the part of its agents. It is common cause that the goods were destroyed by a fire which resulted from a burst tyre on the conveying vehicle. Having regard to the totality of the evidence before the Court, it seems to me that the loss *in casu* was occasioned by an unexpected and unavoidable accident, viz. *damnum fatale*, and not by reason of wilful misconduct or gross negligence. It is arguable that the burst tyre might have been defective or that the goods with which the plaintiff's goods were mixed might have been flammable or that the driver of the truck might not have done enough to extinguish the fire. These are indicators of possible negligence on the part of the second haulier and/or its servants. However, they are all matters of conjecture and, whether taken in isolation or together, they do not evince any wilful misconduct or gross negligence on the part of the defendant or its agents such as to render the defendant liable for the loss incurred by the 1st plaintiff.

Accordingly, the plaintiffs' claim cannot succeed and must fail, both on the main ground of breach of contract and on the alternative ground of negligence.

Costs

It is submitted for the defendant that the plaintiffs' cause of action was misconceived from the outset and that they should

therefore be subjected to an order for costs on the higher scale. I see absolutely no warrant for such an order in this case. The plaintiffs' claim was not entirely devoid of merit, particularly on the relevant questions of law which were not unarguable or without some measure of complexity. In the result, the plaintiffs' claim is dismissed with costs on the ordinary scale.

Nhemwa & Associates, plaintiffs' legal practitioners
Gill, Godlonton & Gerrans, defendant's legal practitioners