



## IN THE HIGH COURT OF SWAZILAND

Civil case No: 2000/2014

In the matter between:

**ZZANE INVESTMENTS (PTY) LIMITED**

**APPLICANT**

**AND**

**SBT COMPANY LIMITED**

**FIRST RESPONDENT**

**ZIA MOTORS (PTY) LTD**

**SECOND RESPONDENT**

**SAFMARINE SWAZILAND (PTY) LIMITED**

**THIRD RESPONDENT**

**SWAZILAND REVENUE AUTHORITY**

**FOURTH RESPONDENT**

**SWAZILAND GOVERNMENT**

**FIFTH RESPONDENT**

Neutral citation: *Zzane Investments (Pty) Ltd v. SBT Company Limited and 4 Others (2000/2014) [2014] SZHC62 (3 April 2014)*

**Coram:**

**M.C.B. MAPHALALA, J**

### **Summary**

Civil Procedure – contract for the sale of goods to be conveyed by sea known as “c.i.f.” – obligations of the seller considered, namely, shipping the goods as well as the bill of lading – the applicant seeks to compel the third respondent shipping company to release the consignment of motor vehicles bought by the applicant and second respondent from the first respondent – held that the third respondent could not release the bill of lading to the applicant and second respondent without payment of the purchase price, shipping and transportation costs as well as storage and detention costs - application accordingly dismissed.

**JUDGMENT**  
**3 APRIL 2014**

[1] An urgent application was lodged in Court on the 1<sup>st</sup> November 2014 on an ex-parte basis for the following orders: Firstly, interdicting and restraining the third respondent from releasing a consignment of motor vehicles to the second respondent; secondly, directing the third, fourth and fifth respondents and their agents to deal with the applicant in all transactions relating to the release and registration of the motor vehicles; thirdly, directing the first respondent to comply with the agreement concluded with the applicant for the release of documents of the consignment of motor vehicles upon full payment of the purchase price and incidental costs; fourthly, directing the fourth and fifth respondents to assist the applicant to effect lawful registration of the consignment; fifthly, directing the first respondent to pay all ancillary costs inclusive of storage; lastly, directing the first respondent to pay costs of suit at attorney and own client scale.

[2] It is common cause that the applicant obtained a rule nisi on the 28<sup>th</sup> December 2013 calling upon the respondents to show cause why the interim order should not be made final. The *rule nisi* was served upon all parties on the 30<sup>th</sup> December 2013. The rule nisi was returnable on the 30<sup>th</sup> January 2014; on that day a deed of settlement was presented to Court and

made an order of court. In terms of the Order the third respondent was authorised and directed to release container number MSKU0210492 to the applicant upon payment of the shipping and transport costs as well as the storage and detention costs up to the 31<sup>st</sup> January 2014. The third respondent was further ordered to release to the second respondent container number PONU8083917 upon payment of the shipping and transport costs as well as the storage and detention charges; and, that the said container would remain under attachment pending the determination of costs of suit and incidental charges. The said agreement dividing the consignment was made between the applicant and the first respondent.

- [3] It is common cause that the first respondent sold the consignment consisting of ten motor vehicles to the applicant at its special instance and request; however, the first respondent subsequently ordered the third respondent to deliver the consignment to the second respondent. It was agreed between the parties that upon payment of five thousand US Dollars, the first respondent would ship the consignment to Swaziland, and, the applicant would in turn pay the balance of the purchase price together with the costs of shipping the consignment. Thereafter, the first respondent would hand over to the applicant the consignment.

[4] However, it is not clear from the application what the total purchase price of the consignment was. What is apparent is that a certain deposit was made by the applicant towards the payment of the purchase price. It is also not in dispute that the applicant was granted permission by the fourth respondent to import the consignment and, that the total price reflected in the import permits was E218 000.00 (two hundred and eighteen thousand emalangeni).

[5] It is common cause that no order was sought against the second respondent in the application proceedings. It is further common cause that the cause of action arose as a result of a dispute between the applicant and first respondent. On the 19<sup>th</sup> December 2013, the third respondent received an instruction from its head office in Japan that the consignment should no longer be delivered to the applicant but to the second respondent; in terms of the written instruction, the first respondent had trouble receiving payment from the applicant. On the 25<sup>th</sup> December 2013, the Document of Title, being the original bills of lading were surrendered at the Tokyo offices of the third respondent by the first respondent for the consignment to be released to the second respondent. The consignment arrived in Swaziland on the 27<sup>th</sup> December 2013. It is common cause that this delivery could not be effected in view of the Court Order obtained by the applicant on the 28<sup>th</sup> December 2013 interdicting and restraining the third respondent from releasing the consignment to the second respondent.

[6] It is apparent from the evidence as well as the Court Orders issued on the 28<sup>th</sup> December 2013 and 30<sup>th</sup> January 2014 that the third respondent is entitled to keep the consignment pending payment by the second respondent as well as the applicant of the shipping and transport costs as well as the storage and detention costs. Both parties should bear these costs for their consignments up to the date of their release as directed by this Court on the 30<sup>th</sup> January 2014.

[7] Whilst it is true that no order was sought in the application against the second respondent, it is equally true that the first respondent offered to sell the consignment to the second respondent after the applicant had failed to pay the agreed amount in terms of the contract. Subsequently, a contract was reached between the first respondent and second respondent for the purchase of the consignment consisting of the ten motor vehicles, and, an instruction was made by the first respondent to the third respondent to have the consignment delivered to the second respondent. Before delivery, the applicant obtained the interim order which was returnable on the 30<sup>th</sup> January 2014. The *rule nisi* lapsed on the said date and the second order was made after the applicant and the first respondent had consented to the division of the consignment. In terms of that order both the applicant and first respondent are liable to pay shipping and transportation costs as well

as storage and detention costs up to the 31<sup>st</sup> January 2014. However, their liability cannot end there; it must continue to exist as long as they have not taken delivery of the consignment from the third respondent.

[8] It is common cause that on the 10<sup>th</sup> February 2014, the applicant lodged an interlocutory application seeking an order compelling the first respondent to comply with the court order of the 30<sup>th</sup> January 2014; they further sought an order that the detention penalties up to 31<sup>st</sup> January 2014 should at most be valued at E40 000.00 (forty thousand emalangeni) in respect of both consignments to be shared equally by the applicant and second respondent in addition to the shipping costs. They also sought an order that detention costs incurred after the 31<sup>st</sup> January 2014 should be borne by the first respondent for failure to comply with the court order of the 30<sup>th</sup> January 2014. To that extent the applicant seeks costs against the first respondent at a punitive scale.

[9] This interlocutory application is misconceived on the basis that the third respondent could not release the two consignments prior to the 30<sup>th</sup> January 2014 on the basis of the existence of an interdict obtained by the applicant. The consignments could only be released after the issue of the order of the 30<sup>th</sup> January 2014 on payment to the third respondent of the shipping and transportation costs as well as the storage and detention costs. It should be

noted that the third respondent is not involved in the dispute between the applicant and first respondent; it was compelled by circumstances to defend its rights, and, it would be unfair to saddle it with costs of suit.

[10] This matter relates to a contract for the sale of goods which are to be carried by sea, and, commonly known as the “c.i.f.”, which stands for “cost, insurance, freight”. After the conclusion of the contract, the seller’s obligation is to ship the goods to its destination; thereafter, he has to tender the “shipping documents” within a reasonable time. Shipping documents refers to the bill of lading, a policy of insurance as well as an invoice. Briefly the duties of the seller are the following: firstly, to ship the goods at the port of shipment in accordance with the contract; secondly, procure a contract of affreightment for delivery of goods at the agreed destination, which include the bill of lading evidencing the contract; thirdly, to arrange insurance current in the trade, which must be available to the buyer; fourthly, to invoice the goods to the buyer, with the agreed price, costs of insurance and freight; fifthly, to tender to the buyer as soon as is reasonably possible after shipment, the documents in a valid and effective condition.

See The Law of shipping and carriage in South Africa, BR Bamford, Juta & Co. Ltd third edition 1983 pp 92-93

*Thomas & Co. V. Ltd v. Whyte & Co. Ltd* 1923 NPD 413 at 419

[11] The insurance covers the buyer against risk inclusive of whether the goods had been lost or destroyed at the time of tender of documents; hence, the buyer cannot demand actual delivery of the goods. The buyer is bound to accept delivery of the shipping documents as equivalent to delivery of the goods and as a discharge of the seller's obligations. The tender of the bill of lading is a tender of the delivery of the goods which discharge the seller and entitles him to receive the purchase price.

See *Standard Bank of South Africa Ltd v. Efroiken and Newman* 1924 AD 171 at 190.

[12] *Corbett JA in Lendlease Finance Ltd v. Corp De Mercadeo Agricola* 1976 (4) SA 464 at pp 491-492 deals extensively with the importance of a bill of lading as well as the duties of the contracting parties:

**“The bill of lading taken to the order of the shipper figures prominently in the transaction known as a “c.i.f.” contract. This type of contract for the sale of goods which today forms one of the cornerstones of sea-borne trade appears to have been a product of English mercantile law. Our courts have, nevertheless, been able to accommodate it within the principles of our law and give to it an effect which is broadly in conformity with its nature under English law. According to Harlsbury the commercial reason for the evolution**



of, *inter alia*, the “c.i.f.” contract lies in carriage of goods by sea. It is to the advantage of neither party to the contract that goods should remain “*en dehors*” commerce while they are in the course of shipment. The object and result of the c.i.f. contract is to enable sellers and buyers to deal with the goods while afloat and to transfer them freely by giving constructive possession thereof. The principal document which has enabled this to be achieved is the bill of lading.

Under the c.i.f. contract, in its usual form, the seller is obliged to ship and insure the contract goods and to invoice them to the purchaser for an amount of which includes the price of the goods, the costs of insurance and the amount payable under the contract of affreightment. As soon as reasonably possible after shipment, the seller must tender to the buyer or his agent, in proper form, the bill of lading, evidencing the contract of affreightment, the policy of insurance and the invoice, these being collectively referred to as “the shipping documents”. In the absence of some special agreement, this is all that the buyer can demand of the seller and normally his obligation to pay, or assume liability to pay, the invoice price arises upon such tender. The buyer is covered by the contract of insurance against the risk that at the time of tender, or subsequently, the goods themselves have become lost or destroyed”.

- [13] The bill of lading constitutes an acknowledgement by the Master of the Ship that the goods have been delivered on board; it further evidences an undertaking to carry the goods to the stated destination. The person in whose name the bill of lading is made out may by endorsement and delivery transfer his rights under the bill to another. The holder of the bill

is entitled to receive the goods from the ship at the place of destination. The transfer of the bill is regarded as a form of symbolic delivery, it is tendered together with other shipping documents, against payment of the invoice. Ownership in the goods normally passes to the purchaser upon transfer of the bill of lading and concurrent payment.

[14] It is apparent to me that the contract between the parties is a “c.i.f.” contract and the principles of such a contract are applicable. The shipping documents have already been handed to the third respondent as the holder of the bill of lading by the first respondent as the seller. In order for ownership to pass to the applicant as well as the second respondent, the third respondent should pass the bill of lading to them against concurrent payment of the purchase price, shipping and transportation costs as well as storage and detention costs.

[15] Accordingly, the following orders are made:

- The interlocutory application lodged by the applicant on the 11<sup>th</sup> February 2014 is hereby dismissed with costs.

- The third respondent is directed to release consignment No. MSKU0210492 to the applicant upon payment of the balance of the purchase price, shipping and transportation costs as well as storage and detention costs calculated to the date of payment and release of the goods.
- The third respondent is directed to release consignment No. PONU8083917 to the second respondent upon payment of the balance of the purchase price, shipping and transportation costs as well as storage and detention costs calculated up to the date of payment and release of the goods.
- The applicant and first respondent are hereby directed to pay costs of suit to the second and third respondents jointly and severally, the one paying the other to be absolved.

**M.C.B. MAPHALALA**  
**JUDGE OF THE HIGH COURT**

For Applicant

For Second Respondent

For Third Respondent

Attorney Martin Dlamini

Attorney Ntobeko Piliso

Attorney Bongiwe Dlamini