

a: Kingsbur

Kingsburg Exports Limited

and

seven others (applicants)

v

Commissioner of Customs and Excise

and

Attorney General (Respondents)

Case No 2167/97

Coram S.W. Sapire, AC"J

For Applicant Mr. L. Mamba

For Respondent Mr. Nduma

Judgement

(07/11/97)

The applicants, which are eight foreign companies, seek an order from this court requiring the Commissioner to release a number of specified containers presently detained by the Commissioner at Matsapha.

The application was brought as a matter of urgency, and dealt with as such. Despite this the matter was heard only on the 21st October 1997.

The relief claimed was set forth and described in the prayers of the notice of application.

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After the usual first prayer for the matter to be heard as a matter of urgency, the applicants in prayer two asked for the release to them of a number of containers. It was conceded in the course of argument that for one reason or another some of the containers should be erased from the list and that any order which may be made should not include the following:

1x 40 Container No. KHLU 9442085 Sea No. 45123 KLH INBU 3133500 (wrongly quoted as ENBU) CMBU 409077 which was duplicated on the list.

In the alternative an order was sought requiring the containers to be removed in bond in terms of section 16 of the Customs and Excise Act to Namibia.

The application contained the usual prayer for costs.

During the argument the applicants conceded that they were not entitled to the relief sought in prayer two and confined the object of the application for the remaining containers to be removed in bond to Namibia in terms of Section 16.

For the Respondents a point in limine was raised. It concerned the capacity and authority of the deponent to the founding affidavit.

The Founding affidavit commenced in a manner now only too common by the deponent stating the widely used formula as follows:

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"I, the undersigned,

YAGABARUM MUNIEN do hereby make oath and say that:

1, I am an adult male of Johannesburg and the facts deposed herein are within my personal knowledge and belief and are true and correct. I am the local agent of the applicant companies and as such authorised to swear to this affidavit.(My italics) I annex hereto marked "A'A" copies of my letters of appointment"

There were several aspects to the point raised by the Respondents. It was in the first place correctly pointed out that the letters of authority on which the deponent relied, did not mention the present litigation and did not constitute proof of authority to the deponent to "swear to this affidavit"

This point had to fail however as no one requires authority to give evidence in any matter, whether it be an action or an application. The giving of evidence is a personal act of the witness whether the evidence is given viva voce or on affidavit. No individual can be prevented from giving evidence by any party withholding authority to do so. No individual requires the authority of any party to give evidence for or against that party in any proceedings. The formula I have quoted, ie "I am authorised to swear to this affidavit" appearing in the affidavit is therefor meaningless and should henceforth be omitted from affidavits intended for use in this court.

"A witness, also when a deponent, may testify even if he has no authority to bring, withdraw or otherwise deal with the application itself." Barclays National Bank Ltd v Love

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1975 (2) SA 514 (D) at 515C-E and 515F-G.

See Eskom v Soweto City Council 1992 (2) SA 703 (W)

It was further argued that the Applicants' papers were not in order as there was no allegation in the

founding affidavit to the effect that the applicants had resolved and determined to institute the present proceedings for which purposes they had authorised and appointed the deponent to act on their behalf. A body corporate cannot be represented in court by an individual other than an attorney or advocate admitted to practice in the court. Proceedings of the present nature are instituted on behalf of the Applicant by the attorney who signs the notice of motion and not by the deponent to the founding affidavit. The question of the attorney's authority is dealt with in the rules of court. Any challenge to that authority must be made in accordance with the provisions of Rule 7 (1). This has not been done. There is no reason therefor to question the authority of Applicants' attorney to act on their behalf and to bring these proceedings. The points in limine are therefor dismissed with costs.

Turning now to the merits. In view of the concession rightly made by Applicants, that they were not entitled to the relief claimed in prayer 2 of the notice of motion the only issue remains is whether the Commissioner is entitled to rely on the lien placed on the goods in the containers, or whether the Applicants can require him to deal with them in terms of Section 16.

At this point I must observe and remark on the inexcusable inaccessibility of the statute law applicable in the present case. Although the representative of the Attorney General was able to assist me by providing privately compiled texts of the relevant legislation and amendments the reliance which may be put on such is questionable. For practical purposes I am assuming them to be accurate copies of what was enacted. The series of blue covered files containing the

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Statutes of Swaziland are sadly out of date. Much legislation to which reference has continually to be made does not appear therein. It is many years since they have been updated. They are used at the peril of making mistakes and applying provisions of the law which have been amended or repealed.

The argument that all Statutes are promulgated in the Government Gazette takes the matter no further. It is common experience that the relative copy of the Gazette is seldom to hand or conveniently available when needed and there is no index to the Gazettes of which I am aware.

This is, I understand, a hoary complaint, which has not received proper attention in the responsible quarters for a long time. It is a matter of record that the South African government sponsored the updating of the published statute. The project has however not produced anything. I have a faint hope that if all this is brought to the attention in those responsible quarters to which I have referred, something may be done to remedy the situation.

I have referred to what I believe is Section 16 of the Custom and Excise Act (Act No. 21 of 1971) on which Applicants rely for the relief claimed in prayer three of the Notice of Motion. It reads:

"16. (1) Notwithstanding any other provisions contained in this Act –

(a) the importer or owner of any imported goods landed in Swaziland, or the manufacturer, owner, seller or purchaser of any excisable goods or sales duty goods manufactured in a duty warehouse or the licensee of a duty warehouse in which dutiable goods are manufactured or stored may remove such goods in

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bond to anyplace of entry or warehousing place or to anyplace outside Swaziland:"

Apart from any other difficulties facing the Applicants, sub section five of this section provides that no goods are to be removed in bond under this section from the place where they were landed in Swaziland until they have been entered for removal in bond. There is no allegation that this has been done and the respondents aver positively that it has not.

This is an insuperable obstacle to the granting of any of the relief which the Applicants seek in prayer three.

See Eskom v Soweto City Council 1992 (2) SA 703 (W)

In accordance with the principles examined in, and on the authority of the cases cited the point in limine has to be dismissed.

S. W. SAPIRE

ACTING CHIEF JUSTICE