

CHIRAG MOTIWALA (PVT) Ltd

versus

COLLECTOR OF CUSTOMS (Mutare)

And

THE DIRECTOR OF CUSTOMS

And

THE MINISTER OF FINANCE AND ECONOMIC DEVELOPMENT

HIGH COURT OF ZIMBABWE

HUNGWE J

HARARE, 7 May 2002 and 20 August 2003

Trial Action

Mr *Mazengero*, for the Plaintiff

Mr A B C *Chinake*, for Defendants

HUNGWE J: The plaintiff Chirag Motiwala (Pvt) Ltd (hereafter referred to as (“plaintiff”) is engaged in retail trade in the Mutare area. The first defendant is the Collector of Customs for the Mutare area. He works under the direction and supervision of the 2nd and 3rd defendants respectively.

Sometime in June 2000, 1st defendant, in the course of his duties called at the plaintiff’s offices in Mutare. He interviewed one Kamlesh Charhan in respect of a consignment of bicycle parts imported and sold away when duty had not been paid for them. Kamlesh Charhan professed ignorance of the smuggled bicycles but the 1st defendant persisted in his accusations of impropriety. After certain threats on his status were made Charhan paid \$640 000,00 as a deposit for duty pending further investigations.

Plaintiff denies having unlawfully imported a consignment of bicycles and bicycle spares. It issued summons claiming a refund of the deposit duty paid by Charhan, interest *temporae morae* and costs.

The Defendants dispute the claim. They maintain that the deposit was lawfully paid and counter-claimed for the balance outstanding on the full duty payable of \$1 106 720,17.

In support of its claim, three witness gave evidence on behalf of the plaintiff. Only 1st Defendant gave evidence on behalf of all the defendants.

Ashok Motiwala is the managing director of the Plaintiff. He told the court that his company is in the business of importing goods. His company never imported goods in container number CMBU 2330148. At some point he was advised that his partner had been forced to pay a deposit by the defendants. He instructed his legal practitioners of record to demand a refund of that deposit as none of his company's servants could confirm a receipt of the goods in the container. On further investigations, he established, through one Dekeya, of Anchor Shipping that the container in question had actually been freighted to a company in Mozambique. He however in the end admitted that he could not say to his own knowledge that the container was transported to Mozambique.

Under cross-examination Motiwala agreed that it would not be unusual if his company were confronted with illegal importation of bicycles and bicycle spares as it deals with this type of goods, it having imported 5 to 6 containers of that type of goods in the last four years. On being taken though the NRZ container rail advice note, Exhibit 4 which gave address of consignee as Transfreight (Pvt) Ltd, Mutare, Prime Exports invoice number 1725799 and Exhibit 7 the combined Transport Bill of Lading. He denied knowledge of Fabio Ltd of Mozambique.

Exhibit 4 deals with the goods in container CMBU 2330184 so does Exhibit 5. Exhibit 6 does not give the consignee but Manica Zimbabwe is given as the importer.

Exhibit 7 which the plaintiff's witness accepted to be the principal document, being the Combined Transport Bill of Lading refers to the original bill of lading from Union Ocean Transport Number UOTBOMT 99224. The original bill of lading Exhibit 10 produced by the defendant recites the consignee as the Plaintiff's director, Chirag Motiwala. When asked why original principal document gave his company as the consignee when the rest of the documents reflected either Fabio Ltd or Manica Zimbabwe the witness described the efforts he made to have the issue clarified by Transfreight (Pvt) Ltd to no avail. That company indicated that the instructions from India were that plaintiff was the consignee.

Quizzed on this information, the plaintiff's managing director's explanation became less and less certain. When confronted with more and more documents which support the defendants' case, he professed ignorance of many other aspect of the matter. Asked whether Clifford Chamboko the first defendant had any reason to ... against him, he could not suggest one. When asked whether in view of the documentary evidence before the court that had been placed before him, it could be correct to say that 1st Defendant had investigated the probability that the container in question may have gone to Mozambique, the plaintiff's managing director agreed. He was specifically asked what evidence he had to suggest, as is stated in the summary of plaintiff's evidence that the container went to Mozambique. His explanation was that Exhibit 5 gave consignee as Fabio Ltd, Mozambique. He also relied on Exhibit 7 and 9. Exhibit 7 gives Manica Zimbabwe Ltd as the consignee and Exhibit 9 has its authenticity put in grave doubt by Exhibit 10 the original from Union Transport. I will come to this point later.

The next witness called by the plaintiff is Nicholas Samuel Finch, the Mutare Branch Manager of Transfreight (Pvt) Ltd. His overzealousness was apparent in his initial testimony that the consignment in the container in question was imported for Fabio Ltd by Anchor Shipping. When he was confronted with Exhibit 10 he became unsettled. He could not say whether he received it or not yet he was initially positive about the fact that before anyone could act on an imported container, they need papers which facilitate Customs clearance.

Exhibit 11 must really have stymied this witness. It is generated by his employer's Harare Head Office. It is an invoice directed to the plaintiff for charges incurred in freighting container CMBU 2330148. It was raised on 7 September 1999. When confronted with the document, Nick Finch had no option but to admit that he altered the Delivery Release Order. Exhibit 20 from reflecting the plaintiff's name to reflecting "Fabio Trading". Exhibit 20 is also his employer's document. It was addressed to the holder of the container, in this case G.M.S. Glasgow Road, Mutare, who held it for the account of the plaintiff. The plaintiff's name was tippexed off by Finch and that of "Fabio Trading" inserted. The document as altered by the witness then read "a/c Fabio Trading, Mutare Zimbabwe". The witness signed it on 8 October 1999. His explanation for altering the document was that the documents he had on his file relating to this container reflected Fabio Trading as the consignee. Yet by 8 October 1999 Finch was in possession of copies of Exhibit 10, 11 and 12. I say this because Finch's head office which generates these documents had long passed them on to that branch of their company in terms of the procedures explained in court by Guy Grossmith the managing director at Transfreight, Harare.

Finch goes to the extent of importing into documentary evidence, what is not apparent on the face of that document. He claims for instance that the Harare generated Delivery Release Order, Exhibit 20, ought to have been released to Fabio Trading through Anchor Shipping. Yet the original as I said earlier on was directed to Greenmotors Siding container park Exhibit 12 where this was held, and copied to all the other parties with interest in the good, including customs, the importer and the transporter to facilitate the movement of the goods imported.

Under cross-examination when confronted with the documentary evidence placed before this court, Finch ended up stating that he was in no position to challenge the authenticity of documents generated by his Headquarters in Harare who are in a position to know the true contents of the original documents dealing with each input. Cross-examination exposed Finch as a less than honest witness. He was eager to shift blame to Anchor Shipping. He was that this was Fabio Trading consignment when he had no proof to that. The clear evidence which he could not dispute point to a scam that involved himself and the plaintiffs.

He was clearly an unreliable witness. He must have been part of a scheme that used false documentation to clear this consignment as being "in transit" to Mozambique when in fact it was not. I say this because Finch is the only witness who kept referring to Fabio Trading and Anchor Shipping. Yet more of the papers generated by Transfreight refers to Fabio Trading.

The first reference to Fabio is made in Exhibit 9 dated 3 September 1999. This is a computer generation of Exhibit 10 the original invoice from Union Transport International in the Channel Islands. It is directed to Transfreight (Pvt) Ltd in Harare, Zimbabwe, because charges raised by its India branch were to be paid at

destination (see exhibit 7) which according to Exhibit 4, 6, 7, 9 and 10 was Mutare Zimbabwe. Thus Exhibit 9 is a forgery meant to mislead. Whilst it speaks of Fabio Ltd, Chimoio Mozambique, Finch consistently referred to Fabio Trading of Mozambique. Whilst the plaintiff's first witness denied any knowledge of Fabio, Finch gave the clear impression that this was a company which was closely associated with the directors of the plaintiff sharing the same business premises and using the same clearing agents, Anchor Shipping. In fact according to Finch Fabio Trading or Fabio was synonymous with Anchor Shipping.

When the movement of the container from Green Motors Siding of the NRZ by Centurion Haulage between 1 and 2 October 1999 to Nyazura on behalf of Chirag Motiwala as is shown in Exhibit 13, 14 and 15 and the affidavit of Marcel Weale, the driver in Exhibit 15, Finch had no basis to dispute that the contents of this CMDU 2331048 were deposited at Nyazura.

The other witness for the plaintiff was Denford Dekeya. He was the managing director of Anchor Shipping of Best Prices Centre, Mutare. His evidence did not push the plaintiff's case an inch. He was also demonstrably shown to be a liar during cross-examination. For example he is the only one who was able to see some evidence on Exhibit 4, 5, 6, 7, 8 and 9 that the container passed through Forbes border post on its way to Chimoio its final destination. I am satisfied that he is the person together with personnel at plaintiff's, behind the scheme that uses false documents to avoid payment of duty. His evidence is patently false and not worth of belief.

He could not explain with his 10 years experience as a clearing agent, why anyone would want to route their imports from India through Zimbabwe to Mozambique. One would have expected him to

give the court some of the explanations that they receive as agents or the frequency of such re-routing.

I am unable to accept this witness's evidence for the reasons I gave above.

The last witness for the plaintiff was Kamlesh Charhan. His evidence was on the circumstances surrounding the payment of the deposit of \$640 000,00 to 1st defendant. He told the court that the first defendant alleged that he had unlawfully imported a container on which no duty had been paid.

He denied the allegations. The 1st defendant persisted in his allegations and threatened that if he did not pay deposit he will cause his arrest and subsequent deportation.

He wanted this court to believe that the threat of deportation led him to agree to pay a deposit of the duty that had been evaded. I am unable to believe him in view of the findings of credibility of the other witnesses for the plaintiff. This witness is a director in the plaintiff. Whilst he denied any knowledge of Fabio Trading of Mozambique, there is an express admission of the same in the summary of evidence, that plaintiff used to import for Fabio Trading. His denials in court, like those of the first witness are false.

On the other hand the defendants' evidence led through the 1st defendant, only confirmed what is apparent on the documents produced in trial. The explanation given by Clifford Chamboko accords with the possibilities in this case.

According to Chamboko, had the agents who cleared the goods in question done so honestly i.e. for removal on transit to Mozambique, then a road manifest as in Exhibit 28 will have been the

best of proof of that fact. Instruction on it are that it has to be completed in triplicate. None of the plaintiff's witnesses speak of a road transporter manifest.

In the present case the transporters involved are NRZ, Transfreight, GMS Freight and Centurion Haulage. The latter moved the container from GMS Container Park in Mutare to Nyazura, he did not need exhibit 28. The plaintiff's first witness is a regular traveler to Mozambique in his own evidence. Had he been in a position to show that in deed the goods were shipped to Mozambique it would have been an easy task for him to pass through Fabio Trading Ltd in Chimoio and bring Ex 28 which has to be kept together with other consignments notes. Indeed he chose to query only the source of that gave his company as consignee in India. His efforts did not yield any result.

The reason his effort failed must be that his company imported these goods. In the process and in a bid to avoid duty, Exhibit 9 was computer generated with the alteration of consignee from Chirag Motiwala to Fabio Ltd. It is no coincidence that whilst his sources produced it the originator, Transfreight or Union Transport only had Exhibit 10 which reflected the correct position as explained by Mr Grossmith.

Exhibit 21 which is Union Transport India's document, shows that the shipper, Prime Exports was asked by an importer to ship the goods to consignee Chirag Motiwala in Mutare Zimbabwe as far back as 25 August 1999.

Alteration of shipping documentation occurred in the Mutare offices of Transfreight (Pvt) Ltd, Chirag Motiwala (Pvt) Ltd, Anchor Shipping and Best Prices Marine Zimbabwe proforma documents were used to clear falsely this shipment.

The conclusion is inescapable that Chirag Motiwala imported and received goods liable to seizure. In Mutare, when the goods were now at Green Motors Siding Container Pack, documents were forged and reflected that these goods were in transit to Fabio Trading, a company in Mozambique when in truth and in fact the company by that name was not involved in the importation of the goods. Those documents were altered or computer generated for the sole purpose of misleading customs so as to evade payment of duty. Thus the goods in container CMBU 2331048 were goods liable for duty. Plaintiff was liable to pay duty. He did not do so nor was he able to show that the goods were on transit to Mozambique.

In the premises the plaintiff's claim fails. The defendants suffered prejudice in the sum equivalent to the amount due as at 1 October 1999. As plaintiff paid \$640 000,00 out of the duty due in the sum of \$1 106 720 16 the defendants counter claim succeeds to that extent.

In the premises I will make the following order.

- 1) Plaintiff's claim is dismissed with costs.
- 2) Plaintiff is to pay defendant the sum of \$466 720.17 being the balance of the outstanding duty payable together with interest at the rate of 30% per annum from 19 April 2002 to date of payment in full.
- 3) Costs of suit.

Messrs *Muvingi & Mugadza*, legal practitioners for Plaintiff
Attorney General's Office, legal practitioners for the Defendants