THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

REPORTABLE

CASE NO: 166/2011

In the matter between:

HENTIQ 1320 (PTY) LTD **APPELLANT**

and

MEDITERRANEAN SHIPPING COMPANY SA GENEVA **RESPONDENT**

Neutral citation: *Hentiq 1320 (Pty) Ltd v Mediterranean Shipping Company* (166/11) [2012] ZASCA 56 (30 March 2012).

Coram: Farlam, Navsa, Snyders, Malan JJA et Plasket AJA

Heard: **24 February 2012**

Delivered: **30 March 2012**

Summary: Damages – whether appellant entitled to recover damages from respondent in respect of liability incurred by appellant to a third party in circumstances where the appellant was morally but not legally liable.

ORDER

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

The appeal is dismissed with costs.

JUDGMENT

FARLAM JA (**NAVSA, SNYDERS, MALAN JJA ET PLASKET AJA CONCURRING**):

[1] The appellant in this matter, Hentiq 1320 (Pty) Ltd, appeals with leave of this court against a judgment[1] delivered by Wallis J, sitting in the KwaZulu-Natal High Court, Durban, exercising its admiralty jurisdiction, on 28 September 2010, in which he dismissed with costs a claim brought by the appellant against the respondent, Mediterranean Shipping Company SA Geneva.

[2] The appellant's claim was for payment of R1 672 080 (together with interest and costs) being the damages allegedly suffered by the appellant consequent upon the delivery of three cargoes of rice which had been loaded on three ships, the *MSC Sarah*, the *Orient Vision* and the *MSC Camille* at the port of Kandla in India. The rice was described in the bills of lading issued by the respondent's representatives, an Indian company known as Samsara Shipping (Pvt) Ltd, as 'Indian Long Grain Parboiled Rice'. These bills of lading were issued to the suppliers of the rice, White Fields International (Pty) Ltd, another Indian company, which endorsed them in favour of Kingsburg Exports Ltd, a Hong Kong company. (In what follows I shall call the suppliers 'White Fields' and the Hong Kong company 'Kingsburg'.) Kingsburg endorsed the bills in favour of the appellant against acceptance by the appellant of two bills of

[1] *The Sarah*: *Hentiq 1320 (Pty) Ltd v Mediterranean Shipping Company SA Geneva* SCOSA D349.

exchange (one in respect of the rice loaded aboard the *MSC Sarah* and the *Orient Vision* and the other in respect of the rice loaded aboard the *MSC Camille*).

[3] It was common cause at the trial that the description of the rice appearing on the bills of lading was seriously misleading; it should have read 'Indian Long Grain Parboiled Rice (100% Sortexed Rejection)'. The words in brackets, which were not included in the description of the cargo on the bills of lading, made all the difference as rice which is so described (unlike rice described as 'Indian Long Grain Parboiled Rice', which is clean rice ready for repackaging) is contaminated with the detritus of stones, husks, soil and other contaminants and is not in an edible condition.

[4] The appellant's claim for damages was framed both in contract on the bills of lading and in delict.

[5] It was also common cause at the trial that White Fields, which had been paid for the rice under a letter of credit on presentation of, inter alia, the bills of lading, had obtained such payment by perpetrating a fraud. It had been aware that the rice it was shipping was '100% sortexed rejection'. This was the description which it provided on the Shipping Bill for Export of Goods under Duty Entitlement it had submitted to Indian customs and which it provided to the respondent's agents as reflected in the mates' receipts for the cargo. But the bills of lading it prepared and which were issued on the respondent's behalf omitted, as I have said, the description of the rice as being '100% sortexed rejection'.

[6] For the appellant to succeed in either of its claims, either in contract or in delict, it had to show that it had suffered damages in consequence of either the breach of contract or the delict it complained of. At the commencement of the trial the learned judge made an order in terms of Rule 33(4) '[t]hat the quantification of the [appellant's] claim [excluding a package limitation point pleaded by the respondent] is separated out for later determination, with all other issues to be determined in the present proceedings'.

[7] The contract of purchase and sale in respect of the rice was concluded on or about 8 May 2001. The parties to the sale, according to the pro forma invoice issued by White Fields, were White Fields and Kingsburg and the full purchase price, US $180 000 (US $180–00 per metric ton), was to be paid through a confirmed and irrevocable letter of credit payable at sight through White Fields' bankers in New Delhi. Kingsburg duly caused its bankers to issue an irrevocable letter of credit, in which White Fields was named as the beneficiary, for payment of an amount of US $180 000, against the shipment of goods described as 1 000 metric tons of Indian long grain parboiled rice packed in 50 kg polypropylene bags and consigned on cif terms to Durban. The documents required were a signed invoice in one original plus three copies; a full set of clean 'on board' ocean bills of lading made out to order, endorsed in blank, marked 'freight pre-paid' and providing for Kingsburg to be the notified party; and a marine insurance policy or certificate in respect of the consignment.

[8] Kingsburg on-sold to the appellant 900 metric tons of the rice it had purchased from White Fields and issued three invoices (one on 2 June 2001 and two on 14 June 2001 in respect of these 900 metric tons). The fraud was discovered and the contract with White Fields cancelled before the remaining 100 tons were shipped. The total amount payable under these three invoices was reflected as being US $166 050.01. On 21 June 2001 and 9 July 2001 Kingsburg drew two bills of exchange for amounts totalling US $166 050.01 on the appellant, both of which it accepted.

[9] The initial negotiations regarding the purchase of the rice took place between the appellant and White Fields and it was at all times envisaged that the rice was to be shipped from Kandla to Durban for the benefit of the appellant.

[10] Mr. Iqbal Soomar, the manager of the appellant, who conducted the negotiations leading up to the conclusion of the contract, explained in his evidence that the appellant had not purchased the rice directly from White

Fields because it had needed financial assistance in order to enter into a contract of this magnitude. He originally said in chief that the appellant had a credit facility with Kingsburg which he arranged especially for the rice importation business. His arrangement with Kingsburg was that it would open the necessary letters of credit and charge him [by which he clearly meant the appellant] '2.5 percent commission, interest for 90 days and send me a bill of exchange which I had to sign [ie accept] for the exchange [by which I take it he meant the endorsement and delivery] of the Bill of Lading'.

[11] He also said that he had not paid to Kingsburg the full amount of the bills of exchange, but had come to an arrangement with Kingsburg to repay what he called 'this debt' in its entirety. A portion of it had been paid from the sale of the scrap material, ie the '100% sortexed rejection' rice and, so he stated, 'the appellant owes the balance to Kingsburg'.

[12] In cross-examination he said that Kingsburg had offered to write off the debt but he said he was morally obliged to pay them.

[13] When it was put to him that Kingsburg had not supplied what was called the correct cargo and that legally, at least, the appellant would not have to pay Kingsburg he said:

'Ja, but Kingsburg was not the supplier here.'

[14] Earlier when the point was put to him he said:

'Well, Kingsburg trusted me, lent the money to me, financed the deal for me. Kingsburg didn't know whitefields and Sumeet Saluja [the director of White Fields who handled the transaction on behalf of White Fields]. Kingsburg did not introduce me to this chap. And therefore I feel that they were totally innocent in this matter. And I feel morally obliged that it is my duty to pay to them. And also the understanding and patience that they gave me in this difficult time.'

[15] He also said:

'. . .I don't see how they become the supplier, the supplier was whitefields. Ja, technically you're saying that they sold onto Kingsburg, Kingsburg sold on to Hentiq, that is correct. Right, so you're saying that if Kingsburg supplied me defective goods

then Kingsburg would have to reverse the payment or I wouldn't have to pay Kingsburg?'

[16] When the respondent's counsel replied in the affirmative, he said:
'That may be so, yes.'

[17] When pressed on the point he said:
'I don't think they did anything wrong, that's why I feel I've got to pay them . . . I certainly think that my common knowledge tells me that they're the innocent party here.'

[18] Later in his evidence the judge questioned him on the point. The relevant passage in the record reads as follows:
'WALLIS J Mr Soomar, can you just help me on one matter relating to your relationship with Kingsburg. You described them as your financiers, the people who helped you to finance this transaction? --- Yes, Your Honour.

But the documents which have been put up reflect that Kingsburg bought the goods and then on sold them to the plaintiff with a commission which was 2.5 percent of the purchase price as I recall it? --- Yes, Your Honour.

Why was the transaction structured in that fashion, was that – and perhaps I can ask a second question, is it structured in that way because of the dictates of your faith in regard to borrowing money and paying interest or is there some other commercial reason for it? --- No, Your Honour, you're quite, quite 101 percent correct, it's to do with my faith. You will notice that there is no interest on there.

No. --- And the 2.5 percent is a borrowing finance – it's a commission exactly in terms of the way the Islamic finance works, a profit is added.

As I understand it and please correct me if I am wrong, the principle is that one doesn't lend money for interest, but one participates with the other party in a commercial transaction where it is legitimate to make a profit or a loss, but the financier is at risk on the transaction, is that correct? --- The financier is at risk yes. Yes, Your Honour.

. . .

I am really not concerned. --- The financier is at risk, but the borrower has an obligation.

This is the moral obligation you talked about yesterday? --- Yes, exactly, Your Honour.

And presumably the amount of the commission is calculated to provide the sort of return which a financier would look for? --- Exactly, Your Honour.

Was it 2.5 percent here? --- For the entire contract.

But that would be 2.5 percent over a period of what was anticipated to be three months, which would have been times four.

It would be 10 percent if you were looking at an annual? --- Exactly.

Or at an interest rate if I can put it that way? --- Yes, Your Lordship.

Thank you, I thought that was the situation.'

[19] The court a quo based its decision to dismiss the appellant's claim on the fact that it had failed, so the court held, to prove that it had sustained any recoverable loss. In paras 20 and 21 of his judgment the judge said:

'…what the plaintiff is seeking to recover is the amount paid by Kingsburg in terms of the letter of credit on the basis of its own obligation to reimburse Kingsburg. *Prima facie* Kingsburg was entitled to recover that amount from Whitefields on the basis of its fraud. It is possible, if it could prove that the employers of Samsara were parties to the fraud, that it might equally have had claims against Samsara or even MSC. However the claims pursued in this action are not the claims of Kingsburg. Instead the plaintiff seeks to recover under the bills of lading from MSC as the carrier. It does not sue as cessionary of the claims of Kingsburg. The question that arises from this is whether the plaintiff has suffered any loss as opposed to the loss Kingsburg have suffered.

It is here that there is an insuperable obstacle in the path of the plaintiff. It arises from the fact that the structure of the transactions involved back-to-back sales from Whitefields to Kingsburg and from Kingsburg to the plaintiff. Because of that structure the plaintiff had no contractual link with Whitefields and the party to which it was entitled to look for performance of the contract was Kingsburg. The latter had agreed to sell it rice of a particular description and the rice that it delivered was defective because it was '100% sortexed rejection'. Whilst Whitefields was the source of the problem, at the level of contract the only party against whom the plaintiff had a remedy was Kingsburg. It was entitled to reject the rice that was tendered for delivery as being defective, to cancel the sale and to refuse to pay for it. Had it done so it would have been acting in accordance with its rights and would have suffered no loss.'

[20] He summarized the evidence given on this aspect of the case by Mr Soomar, which has been quoted above, and proceeded in paras 23 and 24:

'Commendable though this stance might be as an exemplar of honest dealing, and

understandable as it is given that the structure of these transactions was dictated by Mr Soomar's Islamic faith, the problem remains that as a matter of law the contract remains one of purchase and sale between Kingsburg and the plaintiff. It is not a loan by Kingsburg to the plaintiff any more than there was a contract of sale in respect of the rice between Whitefields and the plaintiff. In terms of the contract of sale Kingsburg concluded with the plaintiff it undertook to deliver rice of a certain description and it failed to do so. As a matter of law there is therefore no obligation on the plaintiff to pay Kingsburg for that rice. The fact that it chooses to do so does not give rise to a loss recoverable from MSC.

Whilst I accept that the transactions between the plaintiff, Kingsburg and Whitefields were structured in the particular form that I have described in order to meet the dictates of the Islamic faith, that does not mean that the court can treat them as if they had a different form or give them an effect other than that which they have in law. Nor has any evidence been led before me to show that what Mr Soomar described as a moral obligation has, by virtue of its Islamic context, a specific legal content. In other words it has not been submitted, nor has any evidence been tendered to show, that the conventional transactions into which the parties entered were, as between the plaintiff and Kingsburg, overlain by a legal obligation arising from Islamic principles, that imposed a legal duty on the plaintiff to compensate Kingsburg for its loss arising from the payment of the letter of credit. Absent any such evidence the obligation that the plaintiff perceives that it owes to Kingsburg remains a moral and not a legal obligation. The fulfilment of such an obligation does not give rise to loss of a character recoverable by way of the contractual claim advanced in this action.'

[21] The claim was accordingly dismissed.

[22] Mr *Shaw* QC, who appeared for the appellant, submitted that it was overwhelmingly probable that persons acting on behalf of Samsara, the respondent's agents in India, were complicit in the fraud committed by White Fields and that the appellant's main cause of action was based on that fraud. All that had to be shown in the present stage of the proceedings was that an amount was payable by the respondent to the appellant in consequence of the appellant's belief that it had received conforming cargo, which belief had been engendered by the fraud.

[23] He submitted further that the intervention of Kingsburg did not relieve the respondent of its obligations to the appellant. He attacked the judge's finding that it was open to the appellant to reject the rice as being defective, to cancel the sale and refuse to pay for it. He contended that in an action between the appellant and Kingsburg it would have been open to Kingsburg to say that it had intervened in the transaction solely as a financier and that the appellant had no complaint against it for the supply of defective goods. Kingsburg could, he submitted, say to the appellant 'we were not the true suppliers of the rice. We undertook no obligation that the rice would be in accordance with the shipment sample received [which was of clean rice ready for repacking]. Our sole obligation was to make payment against a bill of lading which complied with the letter of credit.'

[24] He thus submitted that the true substance of the agreement between Kingsburg and the appellant was different from the form as set out in the documents.

[25] He pointed out that in order to obtain delivery of the rice (which it believed to be as described in the bills of lading) the appellant had to enter into a transaction which made it liable to Kingsburg, namely it had to accept the bills of exchange drawn on it by Kingsburg. He referred to the agreement between the appellant and Kingsburg to the effect that after the outcome of this case there was to be what he called an adjustment of rights between Kingsburg and the appellant. In the meantime Kingsburg was to receive the amount of salvage. He referred further to *Par Excellence Colour Printing (Pty) Ltd v Ronnie Cox Graphic Supplies (Pty)* Ltd 1983 (1) SA 295 (A), in which this court held that a party which had settled a damages claim against it and agreed to pay an amount set forth in the settlement agreement, was entitled to recover the settlement figure from the party legally responsible for its having to pay the damages and that it did not have to prove the quantum, provided that it acted reasonably in concluding the settlement. The court referred with approval to a decision of the English Court of Appeal, *Biggin & Co Ltd v Permanite Ltd Berry Wiggins & Co Ltd* [1951] 2 All ER 191 (CA) in which this principle was applied. Applying the *ratio* of that decision to the present case, Mr *Shaw* contended that

it would, as he put it, have been ‘a bold legal adviser’ who would have told the appellant not to pay what it owed to Kingsburg under the bills. If the appellant had sought legal advice on the matter proper advice would have been that something should be paid. In view of the order for the separation of issues made at the start of the case all the appellant had to show at this stage of the case was that it suffered some damage. The judge, he continued, accordingly erred in holding that the appellant suffered no damage at all.

[27] In reply Mr *Mullins* SC, who appeared for the respondent, supported the judge’s finding that the appellant had not sustained any recoverable loss and that the appeal had to fail on that ground.

[28] He submitted further that the *Par Excellence* decision on which Mr *Shaw* relied was distinguishable in that the principle there accepted applied only as to the quantum of a claim settled, in other words where it was clear that the liability of the party which settled the action was unassailable. That that was the case in the *Par Excellence* matter appears from what was said in the judgment at 308F–G.

[29] I do not think that there is any basis in the light of the evidence given by Mr Soomar which has been set out above to hold that the relationship between the appellant and Kingsburg was not what it purported to be and am in agreement with what the judge held in that regard.

[30] I am further of the view that Mr *Mullins* was correct in submitting that, absent liability on the part of the appellant to Kingsburg, what one can call the *Par Excellence* principle cannot be applied.

[31] It follows that the order made by the court a quo was correct and the appeal must fail.

[32] The following order is made:
The appeal is dismissed with costs.

I G FARLAM
JUDGE OF APPEAL

APPEARANCES

APPELLANT:	D J SHAW QC Instructed by Mohamed Hassim Attorneys, Durban; Naudes Attorneys, Bloemfontein.
RESPONDENTS:	S R MULLINS SC Instructed by Shepstone & Wylie Attorneys, Durban; Matsepes Attorneys, Bloemfontein.