THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 279/2012
Not Reportable

In the matter between:

LYKES LINES LIMITED, LLC **APPELLANT**

and

VEREENIGING MEAT PACKERS (PTY) LTD **RESPONDENT**

Neutral citation: *Lykes Lines Ltd v Vereeniging Meat Packers* (279/2012) [2013] ZASCA 18 (20 March 2013)

Coram: Mthiyane DP, Brand, Petse JJA, Schoeman and Erasmus AJJA

Heard: **25 February 2013**
Delivered: **20 March 2013**

Summary: Breach of Contract ─ Shipping line claiming damages for non-return of container ─ Shipping line failing to prove that it suffered damages ─ appeal dismissed with costs.

ORDER

On appeal from: KwaZulu-Natal High Court, Pietermaritzburg (Balton, Sishi JJ and Moodley AJ sitting as court of appeal):

The appeal is dismissed with costs.

JUDGMENT

MTHIYANE DP (BRAND, PETSE JJA, SCHOEMAN AND ERASMUS AJJA CONCURRING)

[1] This is an appeal against a judgment of the full court of the KwaZulu-Natal High Court (Balton J, with Sishi J and Moodley AJ concurring) allowing an appeal from the decision of a single judge, Swain J in favour of the appellant. The appeal is concerned with a claim by the appellant for damages against the respondent arising out of the loss of a reefer container which was being conveyed by the appellant from Montreal, Canada to the port of Durban in terms of a contract of carriage, more fully described in the Bill of Lading.

[2] The appellant is a registered company based in the United States of America where it carries on business as an ocean carrier. The respondent, Vereeniging Meat Packers (Pty) Ltd, is a South African company which produces processed meats of which turkey skins are an ingredient. At the time the reefer container was full of frozen turkey skins. The respondent located some of these turkey skins in Canada and arranged for their

transportation to the City Deep Cold Storage, in City Deep, Johannesburg.

[3] In terms of the parties' contract of carriage the appellant received a reefer container for ocean carriage from Montreal, Canada, on board the *MV Lykes Runner* to the port of Durban. The terms of the carriage were subject to the carrier's conditions printed on the reverse of the Bill of Lading. In terms of clause 6(b)(1) thereof:

'— If Containers supplied by or for the Carrier are unpacked at the Merchant's premises, the Merchant is responsible for returning the empty Container in working condition with interiors brushed and cleaned. The Containers must be returned to the point or place designated by the Carrier within the time prescribed failing which the Merchant will be liable for all resulting direct, incidental and consequential damages including demurrage, detention and per diem charges, however designated.'

[4] On discharge of the container in the port of Durban, the respondent's clearing agent, Impson Freight (Pty) Ltd (Impson), presented the original Bill of Lading to the appellant, took delivery of the container, arranged for its transportation to the respondent's premises, at the City Deep Cold Storage. On the respondent's instructions Impson arranged for the container to be conveyed by merchant haulage, that is by a road haulier which had to uplift it from the port and deliver it to the respondent, as the importer. Impson outsourced the transportation of the container to Pascal Logistics, which arranged for a truck to convey the container to the respondent's premises. In terms of the contract the respondent 'undertook to turn the empty container into the [appellant's] depot for empty containers'. The container was unfortunately not returned to the appellant. It transpired that the truck transporting the container was hi-jacked en route from Durban to the respondent's premises and the container was stolen.

[5] The appellant was not the owner or lessee of the container. In reply to the respondent's request for further particulars for trial as to the identity of the owner of the reefer container the appellant averred that GE SeaCo was the owner and that it was 'the person in whom the risk in the container was vested'. The container had been leased by CP Ships (UK) Limited (CP Ships) from its owner, GE SeaCo Services Limited (GE SeaCo). The appellant is a subsidiary of CP Ships. CP Ships reimbursed GE SeaCo for the loss by payment of the sum of US$21 601.25. In terms of a certain internal arrangement involving certain book entries CP Ships debited the appellant with the amount of the loss, on the basis that it was the shipping line within its group that had carried the container immediately prior to its loss.

[6] The question which is before this court, with its special leave, is whether the appellant has proved that it has suffered loss as a result of the loss or theft of the container. Put differently, the question is whether the allocation of the loss in terms of the aforesaid internal arrangement vested the appellant with the right to recover from the respondent, the loss it claims to have suffered as a result of the non-return of the container. At the trial in the high court Swain J found for the appellant and granted judgment against the respondent in the sum of US$21 601.25 being the replacement value of the container. The respondent successfully appealed to the full court which substituted the trial court's judgment with an order dismissing the appellants claim with costs.

[7] The appellant's claim was based on clause 6(b)(1) of the Bill of Lading. It sued for breach of contract arising out of the respondent's failure to return the container and for the value of the container in the sum of US$21 601.25. The respondent disputed the claim primarily on the

basis that the appellant did not have locus standi to sue and that the appellant had not proved that it was the entity that bore the risk of loss in respect of the container.

[8] In the appeal before us the question is still whether the appellant proved that it suffered damages consequent upon the loss of or the non-return of the container and whether the evidence led by the appellant of the so-called internal arrangement was sufficient to indicate that the appellant bore the risk of loss of the container at the time of its loss or theft in the hi-jacking incident.

[9] At the trial Swain J identified two issues as material to the determination of the dispute between the parties. The first was whether the appellant had established locus standi (standing) and the second was whether on a correct interpretation of clause 6(b)(1) of the Bill of Lading the respondent was liable to compensate the appellant for the financial loss it suffered as a result of the non-return of the container. The court noted that the real issue in the case was whether the appellant has established that it suffered the financial loss, occasioned by the loss of the container in terms of the 'internal arrangement' between CP Ships, Container Equipment Leasing (CEL) and the appellant. As already indicated the appellant was neither the owner nor the lessee of the reefer container but relied for its right to claim solely on a certain 'internal arrangement' in terms of which the loss of the container was allocated to it by CP Ships.

[10] The internal arrangement testified to by the appellant's witness Mr TJ Phillips insofar as it related to the leasing of the container in question was to the following effect. GE SeaCo was the owner of the container. It

concluded a lease agreement with CEL, which was a leasing entity for CP Ships. All containers leased to CP Ships were done through CEL. CEL, a subsidiary of CP Ships was set up in order to source all the containers needed for CP Ships and all the other various lines within its group. If a leased container was lost or damaged CP Ships would pay the leasing company (in this case GE SeaCo) on behalf of CEL and then the individual line in this case, the appellant, Lykes Lines, would be debited by CP Ships internally. In terms of this internal arrangement CP Ships allocated the loss of the container to the line that was in fact carrying the container at the time.

[11] During cross-examination by the counsel for the respondent, Mr Shepstone, Mr Phillips was asked whether the appellant was in possession of any document that 'evidences or records such an internal arrangement'. He initially said that there would be one but later positively asserted: 'yes there is'. The document was never produced. In response to a question by Swain J whether the container was to be understood as having been leased by CEL to the appellant, Mr Phillips merely reiterated that the arrangement 'was part of the operating procedures between the various companies'.

[12] The question still remains whether there was any legal basis for the holding company, CP Ships to atrribute to the appellant, the loss accruing initially to CEL, namely the US$21 601.25 incurred as a result of the loss of the container. The appellant bore the onus of showing that it it bore the risk of loss at the relevant time and that it had 'suffered damages pursuant to a legally binding agreement'. The full court noted that for there to have been an enforceable contract, the appellant was burdened with the onus to prove that the parties had intended that their consensus should give rise to

legally enforceable obligations, that is, that the parties should have had animus contrahendi (intention to contract). (See *Minister of Home Affairs & another v American Ninja TV Partnership & another* 1993 (1) SA 257 (A). An agreement will constitute a contract only if the parties intend to create an obligation or obligations. If this intention is present the agreement is said to be valid in the eyes of the law. (See Van der Merwe et al *Contract: General Principles* 4 ed p 7) The evidence of Mr Phillips as to the internal arrangement indicates how the loss was distributed by CEL amongst its subsidiaries and ultimately to the end entity, in this cases the appellant. There is however no proof that this was done in terms of a binding contract between CEL and the appellant. On the evidence the internal arrangement appears to be no more than inter-corporate mutual dealings not in themselves creating legal liability but resulting rather in no more than a non-binding agreement often described as a 'gentlemen's agreement'. (See Christies *The Law of Contract in South Africa* 6 ed p 94) To illustrate the point, when Mr Phillips was questioned by the respondent's counsel, Mr Shepstone, as to whether there was any separate lease agreement between CP Ships or CEL and the appellant, he simply said 'it was merely this internal understanding.' He further stated that none of the subsidiaries could, through this internal arrangement, dictate as to who would bear the loss. He said: 'there was no dictating. It was per operating procedures.' Clearly under these circumstances it cannot be said that there was a legally enforceable agreement in place entitling the appellant to claim for the loss of the container.

[13] I conclude therefore that the appellant has not proved on a balance of probability that it suffered any loss as a result of the loss or theft of the container. The evidence of Mr Phillips, which was presented on the appellant's behalf in respect of the 'internal arrangement' was insufficient

to discharge the onus resting on the appellant as it does not amount to evidence of a legally binding obligation on the part of the appellant to pay for the loss of the container.

[14] The above finding renders it unnecessary to traverse other issues arising in this appeal. As to costs, the respondent was represented by two counsel on appeal and had asked for costs of two counsel in its heads. But on appeal it was conceded, correctly, in my view, that the employment of two counsel was not warranted.

[15] In the result the following order is made.
The appeal is dismissed with costs.

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K K MTHIYANE
DEPUTY PRESIDENT

APPEARANCES

For Appellant:	SR Mullins SC Instructed by: Shepstone & Wylie Attorneys, Durban Matsepes, Bloemfontein
For Respondent:	PF Louw SC (with him HA van der Merwe) Instructed by: Senekal Simmonds, Johannesburg Schoeman Maree Inc, Bloemfontein