THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

JUDGMENT

Reportable
Case no: 204/06

NAME OF SHIP: mv '*MSC SPAIN*'

In the matter between:

MEDITERRANEAN SHIPPING COMPANY (PTY) LIMITED **APPELLANT**

and

TEBE TRADING (PTY) LIMITED **RESPONDENT**

CORAM: **SCOTT, FARLAM, CLOETE, LEWIS *et* CACHALIA JJA**

DATE OF HEARING: **16 February 2007**

DATE OF DELIVERY: **20 March 2007**

Summary: Delict – agent of carrier and shipping line has no legal duty to inform shipper (or consignee) of proposed deviation so as to afford shipper the opportunity of removing perishable cargo from ship if bill of lading permits such deviation.

Neutral citation: This judgment may be referred to as *MSC Spain* [2007] SCA 12 RSA

SCOTT JA/…..

SCOTT JA:

[1] This is an appeal, with special leave, from the judgment of the full court of the Pietermaritzburg High Court exercising its admiralty jurisdiction which upheld an appeal from a decision of Combrinck J, who had absolved the defendant, now the appellant, from the instance. The judgment of the full court is reported at 2006 (4) SA 495 (N). The case concerns two containers of litchis shipped on board the vessel, *MSC Spain*, at Durban for carriage, one, to Jebel Ali, Dubai, the other, to Damman, Saudi Arabia, pursuant to the terms of two bills of lading. The shipper was the respondent, a company which carries on business at Durban as an exporter *inter alia* of perishable fresh fruit to the Middle East. I shall refer to it as Tebe. The bills of lading were issued by the appellant as agent for the carrier, being the owner of the vessel. On arrival at the ports of discharge the litchis were found to have deteriorated in consequence of a delay in the completion of the voyage. Tebe sued the appellant both in contract and delict. The claim in contract was misconceived; the appellant acted at all times as an agent. The claim in delict was founded upon the alleged negligent failure of the appellant to advise Tebe of a delay in the commencement of the voyage and a change in the proposed route of the vessel to the ports of discharge.

[2] The appellant is a South African company. Its business is that of ships' agent in South Africa for the Geneva registered company, Mediterranean Shipping Company SA (hereinafter referred to as 'MSC Geneva'). The latter operates a large and well-known fleet. It owns some of the vessels in the fleet; others it operates in pursuance of time charters. The relationship between the appellant and MSC Geneva is governed by a written agency agreement, a copy of which was admitted in evidence. The appellant's duties as agent include typically the acceptance of bookings and the marketing of its principal's services. It is also authorised 'to issue, sign and stamp' bills of lading on behalf of its principal 'and/or the Master'.

[3] The *MSC Spain* was on time charter. Rider clause 66 of the charter party reads:

'The Master, Charterers and/or their agents are hereby authorized by Owners to sign on Masters' and/or Owners' behalf Bills of Lading as presented without prejudice to this Charter Party . . . . '

It was in terms of this clause that the appellant acted directly as the owner's (ie the carrier's) agent in issuing the bills of lading.

[4] At the commencement of the trial, the judge, as requested by the parties, ordered that certain issues be decided first and that the remaining issues stand over for later determination. Those to be decided, shortly stated, were the following:

(1) Did Tebe have *locus standi* to sue, whether in contract or delict, for damages arising out of the loss of the consignment of litchis?
(2) Did the appellant contract with Tebe as principal or as agent and, if as principal, what were the terms of the contract?
(3) Is the appellant liable to Tebe in delict for damages by reason of the former's negligent failure to inform Tebe that:
    '(a) the estimated date of departure of the *MSC Spain* . . . from Durban to Jebel Ali was delayed; and
    (b) the route of the vessel from Durban to Jebel Ali was changed?'
(4) Can the appellant rely on the Himalaya clause[1] in the bills of lading and if so, is it excused from all liability?

[1] The clause, which derives its name from the ship in *Adler v Dickson* [1955] 1 QB 158 (CA), provides that 'no servant or agent of the carrier, including any independent sub-contractor employed by the carrier in any circumstances whatsoever [shall] be under any liability whatsoever to the merchant [which by definition includes the shipper, the consignee and the holder of the bill of lading] for any loss or damage or delay of whatsoever kind arising or resulting directly or indirectly from any act, neglect or default on his part while acting in the course and scope of or in connection with his employment . . . '.

[5] The trial court found for the appellant on the issue of Tebe's *locus standi* and granted absolution from the instance. It decided none of the other issues referred to above. Tebe's appeal to the full court was successful. The latter court held that Tebe's *locus standi* had been established. It held further that the appellant was liable to Tebe in delict for any damages it may have suffered in consequence of the appellant's failure to inform Tebe of the vessel's change of route and that the appellant was not protected from such liability by the Himalaya clause in the bills of lading. The only issue on which Tebe was unsuccessful was the second issue listed above. In this regard, it appears that Tebe's claim was initially prosecuted on the incorrect assumption that the appellant and MSC Geneva were one and the same entity and that that entity was the carrier with whom Tebe had contracted. In view of the provisions of the bills of lading, to which I shall refer later, this would have precluded any claim in delict. But, as indicated above, it is quite clear on the evidence that the appellant was at all times acting as agent for MSC Geneva or the owners of the vessel.

[6] It is necessary at this stage to record the events leading up to the conclusion of the contracts of carriage, evidenced as they were by the bills of lading, and the circumstances in which the vessel came to be delayed and her route to the Middle East altered.

[7] The normal route followed by MSC Geneva's vessels from Durban to Dubai is via the East African ports of Dar-es-Salaam and Mombasa, then the ports of Mumbai and Karachi, and thereafter to Dubai. The voyage takes about 21 to 25 days. Tebe had previously shipped consignments of fruit on MSC Geneva vessels to the Middle East but had ceased to do so in favour of other shipping lines which followed a more direct route and completed the voyage in about 15 days. Although litchis were packed in reefer (refrigeration) containers, time remained of critical importance because of their perishable nature. In about November 2001 the appellant received instructions from MSC Geneva to secure

cargo for a special voyage of the *MSC Spain* from Durban, via the island of Reunion, to Dubai where the vessel was due to go off hire. The voyage would take between 12 and 14 days and the estimated date of departure was 6 December 2001. On 26 November 2001 the appellant's assistant trade manager, Mr Roshand Premchund, approached Mr Mahomed Jangda, who is Tebe's operations director, with a view to procuring cargo for the *MSC Spain*'s voyage. Jangda considered the timing to be perfect. Eid, which was preceded by 30 days of fasting, fell on 15 December that year and would be followed by 10 days of celebration. A consignment of litchis which arrived in Dubai on about 18 or 20 December would therefore be readily marketable. Jangda accordingly arranged with his supplier in Malelane (who traded under the name of Laughing Waters) to dispatch a consignment of litchis to Durban. He also arranged with his forwarding agents, WSS Africa, to make the necessary booking, which the latter did on the same day, namely 26 November 2001.

[8] The litchis arrived in Durban on 2 December 2001. They were placed in cold storage to cool to the appropriate temperature and then packed into two containers. The containers were moved to the container terminal on 6 and 8 December, respectively, where they remained until the port authorities authorised them to be moved to the 'stack' for loading onto the ship. In the meantime and because of congestion in the port, the expected date of departure had been altered to 10 December 2001. Loading eventually commenced on 11 December and was completed on 13 December at 7.30 am. The ship left port on 13 December at 10.15 am.

[9] From the time the litchis were moved to the container terminal Jangda was in constant communication with Premchund to ascertain the state of progress and when the ship would sail. By 10 December 2001 he became concerned that by the time the ship arrived in Dubai the celebration period would be over, and that the market would not be able to accommodate the entire consignment of

litchis. He accordingly decided to split the risk by arranging for one of the containers to be carried on to Damman in Saudi Arabia.

[10] In the meantime, another of MSC Geneva's ships, the *MSC Camille*, while heading for Dubai on the usual route, experienced a fire in her engine room and had to be towed to Maputo, Mozambique, by a sister ship, the '*MSC Daniela*'. Back in Durban, the appellant received an urgent instruction from MSC Geneva to direct the master of the *MSC Spain* not to proceed further but to wait in the outer anchorage. This was followed by a further instruction, received at 2.43 pm on 13 December, to arrange a berth for the *MSC Spain* as she was returning to port, which she did at 8.35 am on 14 December. On the instructions of MSC Geneva the containers destined for Reunion were off-loaded and the vessel was directed to proceed to Maputo to pick up cargo from the stricken *MSC Camille*. In all, 171 containers were off-loaded out of a total of approximately 800. The *MSC Spain* left Durban for Maputo at 4.57 am on 15 December.

[11] It was clear that the *MSC Spain* would be unable to accommodate the entire cargo aboard the *MSC Camille*. The *MSC Daniela* was also available to provide some assistance. As at 14 December when the *MSC Spain* was back in port the appellant's employees were therefore aware that she was no longer going to Reunion, that she was calling at Maputo to pick up cargo and would be discharging that cargo in due course. What they did not know at that stage was which and how many of the ports of discharge on the normal route the *MSC Spain* would by-pass en route to Dubai. That they only discovered on 20 December 2001 when they received an email from MSC Geneva setting out the planned rotation. It then appeared that the only port on the normal route at which the *MSC Spain* would not call was Mumbai. In the event, the vessel ultimately arrived at the port of Jebel Ali in Dubai on 10 January 2002. One of the two containers was then transshipped to another vessel which arrived at Damman on 14 January 2002.

[12] Before considering the claim in delict, it is necessary to refer briefly to the question of Tebe's *locus standi.* The only representative of Tebe to testify was Jangda. He stated on a number of occasions in evidence that Tebe had purchased the litchis from Laughing Waters, but he also described Tebe as the former's marketing agents for the Middle East. Although in the present case Tebe had actually paid Laughing Waters R35 per carton for the litchis, he described the payment as being in pursuance of a commercial arrangement rather than a legal obligation. It appears that the arrangement between the parties involved was an extremely loose one and that the price paid to Laughing Waters was finally determined only once the litchis had been sold on the Middle East market by the consignees. Counsel for the appellant defended the finding of Combrinck J that a sale to Tebe had not been proved and contended that the evidence supported the inference of a typical sale on consignment. Counsel for Tebe, on the other hand, submitted that the court *a quo* had correctly found that a valid sale had been concluded between Laughing Waters and Tebe and that ownership had passed to the latter. It was contended further that in any event, even in the absence of a sale to Tebe, the evidence gave rise to an inference of an intention on the part of Laughing Waters to transfer ownership and on the part of Tebe to acquire it. (Tebe did not deliver the bills of lading to the consignees.) In view, however, of the conclusion to which I have come regarding Tebe's claim in delict it is unnecessary to decide the issue of *locus standi* and I shall assume, without deciding, that Tebe did indeed have the necessary *locus standi* to pursue its claim.

[13] I turn then to the claim in delict. What is immediately apparent is that Jangda was fully aware of the initial delay and that the *MSC Spain* did not sail on the estimated date of departure. What he did not know was that in the afternoon of Thursday, 13 December 2001, and after the vessel had sailed, the master was instructed to return to port, that the vessel did return on the morning of 14 December and left again in the early hours of the morning of 15 December en route to Maputo. He testified that had he known that the vessel was coming back

to port and was thereafter to follow a less direct route to Dubai he would either have had the containers of litchis transshipped to another vessel taking a more direct route or he would have had the containers removed and sold the litchis on the local market. It was the omission on the part of the appellant to inform him of the vessel's return to port on 14 December and subsequent deviation that formed the basis of the claim in delict.

[14] Wrongfulness and fault are both requirements for liability under the modern Aquilian action. Negligent conduct which is not also wrongful is therefore not actionable. The inquiry into the existence of the one, save in the case of *dolus*,[2] is discrete from the inquiry into the existence of the other. However, the issue of wrongfulness will more often than not be uncontentious. This is because the culpable conduct complained of will be *prima facie* wrongful. Typically, this is the case where the negligent conduct takes the form of a positive act which causes physical harm. But conduct which takes the form of an omission or which results in pure economic loss is not *prima facie* wrongful.[3] In such cases it becomes necessary to determine whether there is a legal duty owed by the defendant to the plaintiff to act without negligence[4] or, as the inquiry has more recently been formulated, whether, if the defendant was negligent, it would be reasonable to impose liability on him for such negligence.[5] This, in turn, is a matter for judicial judgment involving criteria of reasonableness, the legal convictions of the community, policy and where appropriate, constitutional

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[2] *Minister of Finance and others v Gore NO* 2007(1) SA 111(SCA) para 86.
[3] *Sea Harvest Corporation (Pty) Ltd v Duncan Dock Cold Storage (Pty) Ltd* 2000 (1) SA 827 (SCA) para 19; *Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority* SA 2006 (1) SA 461 (SCA) para 13.
[4] *Indac Electronics (Pty) Ltd v Volkskas Bank Ltd* 1992 (1) SA 783 (A) at 797F; *Minister of Safety and Security v Van Duivenboden* 2002 (6) SA 431 (SCA) para 12; *Local Transitional Council of Delmas v Boshoff* 2005 (5) SA 514 (SCA) para 14.
[5] See *Trustees, Two Oceans Aquarium Trust v Kantey and Templer (Pty) Ltd* 2006 (3) SA 138 (SCA) para 11 where the formulation of Anton Fagan 'Rethinking wrongfulness in the law of delict' (2005) 122 *SALJ* 90 at 109 is cited with approval. See also *Hirschowitz Flionis v Bartlett* 2006 (3) SA 575 (SCA) para 27.

norms.[6] Precedent may also play a role.[7] Where, as in the present case, it is contended that there existed a delictual legal duty in what was essentially a contractual setting, relevant circumstances will include such factors as the extent to which the plaintiff was or could have been protected against the risk of harm by contractual provisions, whether the duty alleged could have arisen in the absence of a contract and generally, depending on the circumstances, the mere existence of the contract. In *Trustees, Two Oceans Aquarium Trust v Kantey and Templer (Pty) Ltd,*[8] for example, the court was not prepared to recognise the existence of a legal duty in circumstances where the plaintiffs could have protected themselves against pure economic loss by contractual means. Similarly, in *Lillicrap, Wassenaar and Partners v Pilkington Brothers (SA) (Pty) Ltd*[9] the court, while recognising the possibility of a *concursus actionum*, declined to accept the existence of a delictual legal duty in circumstances where the plaintiff would previously have had a claim in contract but had subsequently assigned its rights and obligations under the contract to a third party.

[15] To return to the present case, the court *a quo* found that the appellant owed 'a duty of care' to Tebe and that its failure 'to act' was therefore wrongful. In coming to this conclusion Levinsohn J, who delivered the judgment of the court, noted that the appellant had procured Tebe's business on the understanding that the voyage would be of short duration, that the appellant was aware of the limited shelf life of the consignment, that the appellant had been found to have been privy on 14 December 2001 to information that was of vital importance to Tebe and that there existed a relationship of 'agent and customer' between the appellant and Tebe. In these circumstances, the learned judge observed that it would have taken only one telephone call to inform Tebe of the situation and expressed the view that had this been done '[Tebe] in all probability would have

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[6] See eg *Minister van Polisie v Ewels* 1975 (3) SA 590 (A) at 597A-B; *Minister of Law and Order v Kadir* 1995 (1) SA 303 (A) at 318E-G; *Minister of Safety and Security v Van Duivenboden* (n4) para 22.
[7] *Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority SA* (n3) para 15.
[8] Note 5.
[9] 1985 (1) SA 475 (A).

elected to take the containers off the vessel and sell the fruit on the local market'.[10] However, no regard appears to have been had to the terms of the contract of carriage to which Tebe was a party, nor to the relationship between the appellant and its principals.

[16] As previously mentioned, Tebe's forwarding agents, WSS Africa, made the necessary booking with the appellant. It is common cause that the bills of lading were on the appellant's standard form. Mr Christopher Pienaar, an employee of WSS Africa, testified that he inserted the necessary particulars and then submitted the bills to the appellant for the latter to issue. He said that before doing so he sent them to Jangda to check. Jangda was presumably familiar with the appellant's standard bills of lading as he had previously shipped goods with the same shipping line. The terms and conditions governing Tebe's contracts with the carrier were set forth on the reverse side of the bills. Clauses 4 and 7 are of particular relevance. In terms of clause 4 the carrier is afforded the right to deviate from the advertised or ordinary route. More particularly, the clause provides that the vessel may call at ports other than those 'in or out of the advertised geographical, usual or ordinary route' and 'omit calling at any port or ports whether scheduled or not'.[11] In terms of clause 7, the carrier is afforded the right to change sailing and arrival dates without notice.[12] Also of relevance is the

[10] 2006 (4) SA 495 (N) at 509D-H.

[11] Clause 4 of the bills of lading reads as follows: 'THE SCOPE OF VOYAGE. The voyage herein undertaken shall include usual or customary or advertised ports of call whether named in this contract or not, also ports in or out of the advertised geographical, usual or ordinary route or order, even though in proceeding thereto the vessels may sail beyond the port of discharge or in a direction contrary thereto, or depart from the direct or customary route or in a direction contrary thereto. The vessel may call at any port for the purpose of the current voyage or of a subsequent voyage. The vessel may omit calling at any port or ports whether scheduled or not, and may call at the same port more than once, either with or without the goods on board, and before and after proceeding towards the port of discharge, adjust compasses, dry-dock, go on ways or to repair yards, shift berths; undergo degassing, wiping or similar measures, take fuel or stores, land stowaways, remain in port, sail without pilots, tow and be towed, and save or attempt to save life or property, and all of the foregoing are included in the contract voyage. The vessel shall never be called upon to proceed to a place where she cannot safely get and be always afloat.'

[12] Clause 7 reads: 'DEPARTURE AND ARRIVAL DATES in the Carrier's liner position lists, sailing lists and other advertisements are given without any warranty, and no claims shall be acceptable for any change in the dates nor even in the case of the vessel's non-departure for whatever cause. Carrier shall have the right to change sailing and arrival dates without notice.'

introductory clause on the reverse side of the bills of lading. The penultimate sentence of that clause reads 'MSC [Geneva] shall act as agent of the owner or demise charterer in arranging the transport covered by this Bill of Lading'. This provision was presumably inserted so as to enable MSC Geneva to obtain the benefit of the Himalaya clause. But whatever the reason, the effect was that for the purpose of the contract of carriage MSC Geneva acted as the agent of the owner in 'arranging the transport'. That would include determining the route to be followed and the ports of call.

[17] Tebe's claim is for the loss it suffered as a result of the delay brought about by the deviation from the initially proposed route. The appellant was not in any way responsible for that deviation. It was furthermore at all times merely acting as agent, either for the carrier or MSC Geneva. By reason of the clauses in the bills of lading previously mentioned, Tebe would have had no claim in contract or delict against the party responsible for the deviation, whether that party was the carrier or MSC Geneva. Unable to recover from the principal, Tebe seeks in effect to circumvent the consequences of the contract by holding the principal's agent personally liable in delict for failing to afford Tebe the opportunity of removing its containers from the vessel on a ground not amounting to a breach of contract on the part of the principal. But agents are contractually bound to protect the interests of their principals. The legal duty that Tebe contends was owed to it by the appellant would therefore be in conflict with the contractual obligation which the latter had to its principal. Even if it were to be accepted that the appellant was negligent, there can be no good reason in my view, given the contractual setting, for the existence of a legal duty on the appellant to take such steps as may have been reasonable to prevent the harm. It follows that in my judgment the failure on the part of the appellant to advise Tebe of the deviation so as to afford it the opportunity of removing its containers from the vessel was not wrongful and the claim in delict must fail.

[18] For the sake of completeness I propose to deal briefly with the issue of negligence. The finding of the court *a quo* that the appellant had been negligent was founded on what the court held to be an overwhelming probability that the appellant knew on 14 December when the *MSC Spain* returned to port that the vessel would be re-routed to the various ports at which the *MSC Camille* had been scheduled to call. Accordingly, so the court held, it was overwhelmingly probable that the appellant's employees knew that the *MSC Spain*'s transit time was going to be significantly longer than originally contemplated.[13] In my view, the evidence does not support this finding. On 14 December the appellant's employees knew that the *MSC Spain* was to discharge the 171 containers (out of a total of some 800) destined for Reunion and that the vessel was to pick up cargo at Maputo. But they did not know at which ports that cargo was to be discharged, in other words, at which of the ports on the normal route the vessel would call. As I have previously said, they only learned this on 20 December 2001 when they received an email from MSC Geneva setting out the planned rotation. Mr Neville Naidoo, the trade manager of the appellant at the time and who testified on behalf of Tebe, conceded in evidence that if the *MSC Spain* was to replace the *MSC Camille* (and call at all the ports of discharge) the transit time would be the normal 25 days.[14] But he emphasized that the *MSC Spain* already had cargo on board and would not have been able to accommodate all the cargo taken off the *MSC Camille*. When asked in cross-examination why he did not inform Jangda (who, and whose business, was known to him) of the change in the route he explained that based on the information then available he did not anticipate a delay of any significance. There was nothing to suggest that this belief was unreasonable or that any other employee of the appellant was better informed than he on 14 December 2001. In my view, therefore, Tebe failed to establish negligence on the part of the appellant.

[13] 2006 (4) SA 495 at 508B-C.
[14] See the passage in Naidoo's evidence quoted at 507G.

[19] It follows that the appeal must succeed. In the circumstances it is unnecessary to consider the question relating to the Himalaya clause. The failure to do so must not, however, be construed as an endorsement of the views expressed by the court *a quo*.

[20] In view of this court's finding on the issue of delictual liability the appellant is entitled to an order dismissing the claim with costs, as opposed to the order of absolution from the instance granted by the trial court.

[21] The following order is made:

1. The appeal is upheld with costs, such costs to include the costs of two counsel.
2. The order of the court *a quo* is set aside and the following is substituted in its place:
   '(a) The appeal is dismissed with costs;
   (b) The order of the trial court is altered to read:
   "The action is dismissed with costs".'

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D G SCOTT
JUDGE OF APPEAL

CONCUR:
FARLAM JA
CLOETE JA
LEWIS JA
CACHALIA JA