

IN THE COURT OF APPEAL OF LESOTHO

HELD AT MASERU

C of A (CIV) No 35/2016

CIV/APN 30/2015

In the matter between

THE COMMISSIONER OF CUSTOMS & EXCISE

First Appellant

THE LESOTHO REVENUE AUTHORITY

Second Appellant

and

HIPPO TRANSPORT (PTY) LTD

Respondent

CORAM : CLEAVER AJA
CHINHENGO AJA
GRIESEL AJA

HEARD : 17 OCTOBER 2016

DELIVERED : 28 OCTOBER 2016

Summary

Acquittal in magistrate's court on charges of illegally importing cattle into Lesotho not proof in motion proceedings that the cattle were not imported - Application of the Plascon Evans rule.

JUDGMENT

CLEAVER AJA

[1] This is an appeal against a judgment of the High Court which issued orders to the following effect-

- * The continued detention of the Applicant's truck and trailer (hereinafter collectively referred to as 'the truck') by the first respondent was declared to be purposeless and unlawful.
- * The first respondent was directed to release the truck to the Applicant.
- * The respondents were prohibited from declaring the truck to be forfeited.
- * Cost of the suit were awarded to the applicant.

[2] The orders were issued in an application which the respondent in this court had brought as applicant in the court below to secure the release of its truck which had been detained by the first appellant in terms of the Customs and Excise Act 1982. It is clear from the papers filed in the application that the facts which gave rise to the detention of the truck were in dispute.

[3] What was not in dispute was that on the 27th of April 2011 the respondent's truck carrying a load of 24 cattle arrived from South Africa at the Lesotho border post of Caledonspoort. At the time a ban imposed by the Ministry of Agriculture and Food

Security prohibiting the importation of live sheep, cattle, goats and camels from South Africa due to an outbreak of Rift Valley fever and Foot-and Mouth disease in South Africa was in force. Surprisingly, the application in the High Court was not supported by an affidavit by the driver of the truck, the founding affidavit being one made by Isaac Monokoane, (Monokoane) a director of the respondent.

He simply states *“I was informed that the cattle could not be allowed entry into Lesotho due to the outbreak of foot and mouth disease in South Africa. I drove the truck back.”*

[4] Much more information as to what occurred at the border post is provided in affidavits filed in opposition to the application by police officers and an official of the Ministry of Agriculture and Food Security (‘the Ministry’) who were on duty at the border post on the 27th of April 2011. In short, their evidence was to the effect that on the morning of that day, the truck, driven by one Seteroi Alphonso Phakoe, arrived with 24 head of cattle on board which Phakoe wished to import unto Lesotho. It was explained to him that in view of the ban referred to in para 3, he would not be allowed to take the cattle into Lesotho unless he was in possession of a permit from the Ministry permitting the importation. Communication between the driver and the officials ended with the driver informing the officials that he would wait for instructions from his employer. The truck with its load remained parked at the border post and at about 8pm two unknown men arrived, one of whom was said to be the owner of the truck. One of the men asked if they could take the truck back to South Africa, but the request was refused, on the ground that the matter would have to be dealt with in the morning by officials of the Lesotho Revenue Authority (the second appellant). The man who had indicated that he was the owner of the truck then left the room where he and the other man were speaking to the police officer, and shortly thereafter the truck with its load was seen passing through the border post into Lesotho. Two police officers gave chase but even after after invoking aid from a police officer at the Botha Buthe police station they were unable to apprehend the truck. The chase and search ended near the Leribe high school where it was abandoned. An affidavit also presented by the respondents was one attested to by ‘Maletsabisa Molapo, the chief of Hleoheng.. The relevant parts read-

-3- *‘I wish to state that on or about the 27th day of April 2011, I was approached by the two families, namely the Monotoane family and the Tuoane family requesting me to append the stamp and signature on the agreement of marriage which had been*

prepared by the two families on the agreed terms stated therein. -4- I remember well that the parties to the marriage were Monopoli Monokoane and 'Maabieele Tuoane who is Tukula Tuoane's daughter. I further remember very well that in terms of the said agreement a herd of 24 cattle had been agreed upon by the two families.'

[5] To complete the picture, an affidavit filed the Senior anti - smuggling officer in the employ of the second appellant reveals that he detained the truck on the 19th day of April 2012, submitting that he was empowered to do so.

[6] It is common cause that the deponent to the founding affidavit in the High Court application, Monokoane, was charged in the Butha Buthe magistrate's court with contraventions were said to have occurred at the border post on the 27th of April 2011, namely

* Contravening sections of the Value Added Tax Act in that he imported into Lesotho cattle and failed to pay value added tax based on the taxable value of the cattle.

* Contravening sections of the Customs and Excise Act in that he imported into Lesotho cattle which were at the time prohibited from entering the country, alternatively, that he imported the cattle without having a permit for the importation.

At the conclusion of the crown case Mr Monokoane was found not guilty and discharged.

[7] The case for the applicant in the proceedings below was in the main that following the acquittal of Monokoane , the detention of the vehicle, effected on the same facts which were canvassed in the magistrate's court, had become purposeless.

[8] The court *a quo* found that in view of the acquittal verdict in the magistrate's court, there was no proof that the offences had been committed which meant that there was no basis on which an order for the forfeiture of the detained truck could be made. The judge also found, on a consideration of the evidence contained in the affidavits, that there was no proof that the animals had been imported illegally into the country.

[9] The appellants listed four grounds of appeal, namely,

(1) The court *a quo* erred and misdirected itself in finding that the establishment of the commission of a criminal offence is a *sine qua non* for the operation of sec 88(1) of the Customs and Excise Act and failed to appreciate that an offence under the Act is sufficient but not necessary to render the goods liable to forfeiture under sec88(1) and (2),

(2) The court failed to appreciate that where the detention of goods is sanctioned by the Customs and Excise Act or took place in circumstances sanctioned by the Customs and Excise Act, the detention cannot be declared purposeless and unlawful unless the detention took place in circumstances not sanctioned by the Act , more so when the respondent's case was never that the detention of his truck took place in circumstances not sanctioned by the Act.

(3) The court erred and misdirected itself and failed to appreciate that where an administrative functionary is vested with a discretion to act in a particular manner and delays to exercise the discretion or not at all, the relief available for the affected party is to seek an order directing the administrative functionary to exercise the discretion conferred on him and not to deprive, as the court *a quo* did, the administrative functionary of the right conferred on it by statute to exercise the discretion or an opportunity to exercise it and make a decision on behalf of such administrative functionary.

(4) The court erred and misdirected itself in finding as a matter of fact in motion proceedings and in circumstances where the respondent's allegations were disputed by the appellants, that the respondent's motor vehicle had not imported into Lesotho cattle in circumstances alleged by the appellants.

[10] Although there is in my view merit in all four grounds of appeal I do not consider it necessary to delve into the complexities of the issues raised in the first three grounds, for in my view the fourth ground is unanswerable.

[11] The application before the court *a quo* was brought on motion and was to be decided by judicial evaluation of the evidence tendered in the affidavits put up by the parties. As I have mentioned, the only evidence put up in the respondent's founding papers, was that Monokoane had driven the truck back to South Africa. For the rest, the respondent relied on Monokoane's acquittal in the magistrate's court as proof that no animals had been imported into the country. The judge *a quo* accepted the verdict in the criminal court as proof that no animals had been imported into the country, but in my view she was not entitled to make this finding. To start with it was a verdict of a lower court in which a different standard of proof is required and as mentioned by the appellant's counsel, other considerations may have influenced the lower court in coming to its decision. The record of the hearing in the magistrate's court was not before us and furthermore, the parties in the criminal court were not the parties before the court *a quo*. In that court the charges were prosecuted by the Crown while the respondents in the motion proceedings were two different authorities.

[12] Monokoane's allegation that he had driven the truck with the cattle back to South Africa was hotly contested by the evidence put up in the affidavits filed by the officials who were on duty at the border post. Faced with this clear dispute of fact the judge was obliged to apply the well-known rule established in **Plascon- Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd** 1984(3) SA623 (AD) that in motion proceedings, once a genuine dispute of fact has been raised the court is bound to

accept the version of the respondent together with facts contained in the applicant's affidavit which are admitted by the respondent. *It may be different if the respondent's version consists of bald or un-creditworthy denials, raises fictitious disputes of fact, is palpably implausible, farfetched or so clearly untenable that the court is justified in rejecting them merely on the papers*¹

The rule in **Plascon Evans** has been consistently applied in South Africa and also in the courts of this country, the latest example in this court being in **Afzal Abubaker v Magistrate Quthing** [2016] LSCA 5 (28 April 2016).

[13] The respondents' versions are straightforward and cannot be classified as constituting any of the exceptions to the rule referred to in the preceding paragraph and accordingly the version of the respondents must prevail and the appeal must succeed.

[14] We were informed from the bar that the truck and trailer have remained under detention pending the outcome of the appeal. In the event of the appeal succeeding the truck will be liable to seizure by the first appellant in terms of S(89) of the Customs and Excise Act. A decision by the first appellant as to whether or not to seize the detained truck and trailer has been delayed unnecessarily and should be made without further delay. Counsel for the first appellant indicated to us that in the event of the appeal succeeding the first appellant would be able to make the necessary decision within fourteen days and provision for this will be made in the order.

[15] I would issue the following order-

(1) The appeal succeeds with costs.

(2) The order made in the High Court is set aside and replaced with the following order "The application is dismissed with costs"

¹ *National Director of Public Prosecutions v Zuma* (2009) ZASCA 1at para [26]

(3) If the first appellant has not within 15 (fifteen) days from the date on which this judgment is delivered, seized, in terms of S(89) of the Customs and Excise Act No 10 Of 1982, the vehicles of the respondent currently being detained, being, **TRUCK: VIN WMAH32ZZ95-G17476, ENGINE NO35101750, REG MARK** and **NO CH 532** and **TRAILER: MAKE - ERF, VIN ST840015**, the respondent shall be entitled to apply on notice to the High Court to have the said vehicles released from the detention under the Customs and Excise Act.

R. B CLEAVER
ACTING JUSTICE OF APPEAL

I agree :

M CHINHENGO
ACTING JUSTICE OF APPEAL

I agree:

B. M. GRIESEL
ACTING JUSTICE OF APPEAL

Counsel for the Appellants: Adv. L. Mahao

Counsel for the Respondent: L.E. Molapo