IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

CASE NUMBER: 11509/2013

DATE: 28 OCTOBER 2014

In the matter between:

CLIVE BOUSTRED Applicant

and

RIOL CC t/a THRUTAINERS 1st Respondent

SOUTH AFRICAN REVENUE SERVICES 2nd Respondent

J U D G M E N T

RILEY, AJ:

Our courts or our system and the Constitution provides for everyone to have any dispute that can be resolved by the application of the law to be decided in a fair public hearing before a court or where it is appropriate, another independent or impartial tribunal or forum. This is important because it allows for people to have access to the court and it is encouraged and it is generally guaranteed by the rights of safeguarding equal protection of people before the law. Now I say this as an introduction because the applicant in this matter, Mr Boustred, brought this application on his own. He

has represented himself throughout the proceedings and clearly this can be problematic on the one hand and it can also assist one I suppose.

In this matter and before me yesterday and today I heard Ms Enslin appeared for the second respondent. The first respondent merely submitted heads of argument and did not present argument in court. Now it is correct that the applicant is not an attorney, he has indicated in passing that he has had some legal training. He also made it clear that he sought some legal advice in the course of conducting the matter, but more than that he was happy that he could in fact ably conduct the matter. He said to us or it appears from the papers that he had previously prosecuted and / or defended more than twenty cases.

The matter before me and the manner in which it was conducted was regrettably fraught with problems and the truth is that the applicant has fallen foul of numerous procedural errors and problems in the manner in which he conducted the matter. I can mention the following things that immediately comes to the fore; an eg is the fact that the court papers in this application are unnecessarily voluminous and repetitive. The content is not properly prepared nor is it presented in a comprehensible and a manageable sequence. There are many

submissions that are made and were made which are not relevant to the proceedings. This clearly resulted in additional time and obviously will result in increased costs.

It was also clear that there was a misunderstanding of the legal process on the part of the applicant which resulted in a situation where the applicant was seeking damages in terms of the Consumer Protection Act by means of an application process. When I read the papers I saw that there were attempts made by the respondents' legal representatives to explain to the applicant for example that he followed the incorrect procedure and that there is a difference between action proceedings and application proceedings.

The applicant refused to heed their advice and he was adamant in my view to proceed with the matter in the way that he has proceeded with it. It is further necessary for me to mention that after the applicant had brought this application on 19 July 2013 and whilst this application was still in the process of being determined and / or dealt with, he irregularly proceeded to issue a fresh notice of motion dated 21 November 2013 under the same case number, with total disregard of the rules governing our civil procedure.

In this second notice of motion, together with whatever

supporting papers he relied on, the applicant raised basically the same issues and complaints against the respondents. Of course this cannot be allowed nor am I prepared in the circumstances to condone this kind of conduct. However, since the relief that is sought in the fresh notice of motion is essentially a duplication of what he sought in the main application, I will for practical reasons deal with this second notice of motion as if it is incorporated in the main application.

In this matter the applicant has sought relief which is wide ranging and is as follows:

(1) An order for an urgent interdict to compel the respondents to immediately release the applicant's personal shipment to him.

(2) Orders declaring the invoices of Thrutainers against the applicant as null and void.

(3) That the Court dismisses any and all liens imposed by Thrutainers or Intermodel Cargo Solutions against his property which is held in the State Warehouse.

(4) A further order that the Court orders the second respondent, that is SARS, to pay any and all storage fees caused by their delays in releasing the shipments.

(5) The Court orders SARS to return excessive charges

amounting to over R4176.00 charged by SARS to clear applicant's May 2013 computer shipment.

(6) That the respondents pay to him R1 million for lost time and emotional stress or an amount and in a manner in which the Court deems appropriate.

(7) The Court order SARS to implement procedures within 30 days of the order removing any authority for an Inspector to delay the release of a shipment for more than one hour and;

(8) Finally he asked that the respondents pay the costs of the suit.

Both the respondents have opposed the relief that was being sought and have for a variety of reasons submitted that the applicant's application should be dismissed with costs. Various points of *limine* have been raised by the respondents. For practical reasons I will not deal with them at this stage. For the purposes of the application, I will accept that the first respondent and Thrutainers International (Pty) Limited (that is Thrutainers International), are two separate companies which co-exist within a group of companies which have common shareholders.

Insofar as the background and the merits of the matter are concerned, the applicant fled, as he put it, the bad apartheid

government first in 1982 and again in 1989. According to him he was forced to flee back to South Africa from bad government in the United States of America.

He alleges that his technological skills threatened the criminal cabal that owns and controls America. He fled from the US as a consequence of, as he put it, extraordinary and outrageous assaults, including at least five assassination attempts, six false arrests, nine false criminal charges, or cases against him, the theft of his multimillion dollar home, the kidnap and hostage holding of his children, and being forced to pay over R3 million in bail for ridiculous false charges.

In and during 2011 the applicant entered into a contract with Craters and Freighters ("CAF"), a Californian based shipping company, with the view to securing their services in order to transport his personal goods back to South Africa. Now the applicant has contended and it does not seem as if it is in dispute, that he has paid CAF for all charges and services to the point where his goods are ready for collection at Cape Town Port. This is also confirmed in an email dated 19 August 2011, addressed by Steve Papoulious of CAF.

The applicant's case was initially that the first respondent and Thrutainers International were not authorised to unload the

cargo to be cleared through customs and that they did not have authority to store the cargo ready for collection. On that basis he contended that they had 'hijacked' his goods and that since he did not contract with them, he was not indebted to them.

On a consideration of the documents and the version presented by the first respondent, I am in any event satisfied that: firstly, the applicant agreed that he would be responsible for and pay additional costs in offloading the cargo from the ship when it arrived in the port of Cape Town; and secondly, the agreement between CAF and the applicant is such that it had to include his liability for what is referred to as landslide services.

Although the applicant initially disputed this, he has now conceded that there was an agreement between CAF and the applicant in terms of which CAF was authorised by the applicant, at the applicant's costs, to employ agents to attend to first of all, the unloading of the cargo, secondly the clearing of the cargo through customs and thirdly, the storing of the cargo until collected.

It is common cause that the applicant did pay CAF for its services to move the goods from its point of origin to New York

City, which was the port of load and the shipping from the port of load to the stage where the ship carrying the cargo arrived in Cape Town. Those costs would include the collection of the cargo from Santa Cruz California, preparation of the cargo for shipment, delivery of the cargo to the port of loading, US export documentation, ocean transport from the port of load to the port of discharge, which in this case was Cape Town.

There is no evidence, nor did the applicant make any submissions in argument, that he had advised and / or notified CAF that he would arrange for his own clearing agent to clear the goods at the port of Cape Town. What is clear is that prior to the shipment of the applicant's goods to Cape Town, CAF had entered into an agreement with Brennen International Transport ("BIT"), in terms of which BIT would transport the goods to the point where it was ready for collection at the depot of the first respondent and Thrutainers International at Epping Industria Cape Town.

In this regard I refer to the bill of lading and the terms and conditions thereto marked annexures E1 to E14 as indicated on pages 131 to page 144. It is quite clear that the applicant's name, surname and address and that of his company, Infotelesys, as shipper exporter, clearly appears on these documents. In terms of the agreement between BIT and the

applicant, (through his agent CAF), BIT will be entitled to subcontract on any terms, the whole or any part of the carriage, loading, unloading, storing, warehousing, handling and any and all duties whatsoever undertaken by it in relation to the goods or containers or other packages or any other goods as appears from Clause 6 (a) [annexure E4] and secondly, the applicant shall be responsible for all charges regardless of whether the bill of lading states in words or in symbols that it is prepaid or collect. I refer in this regard to Clause 15 as per annexure E10.

In the absence of any evidence to the contrary, it must be that it was either an express or implied term in the agreement between CAF and the applicant, that CAF was authorised to act as the applicant's agent to employ the services of BIT on the terms as set out in annexure E that I have referred to. It is not in dispute that BIT and the first respondent and Thrutainers International have a standing contractual relationship in terms of which Thrutainers International and the first respondent would be responsible to unload, store, warehouse, handle and pay any and all duties of the contents of the containers that BIT ships to South Africa, which are the landslide charges.

In the present matter the first respondent was then required to

transport BIT's containers to a depot sanctioned by the second respondent, where the cargo would be unpacked and stored pending collection by the applicant as the consignee. Based on the agreements between the applicant, CAF and BIT, the applicant is responsible for any charges levied by Thrutainers International and the first respondent in respect of the landslide charges, including the storing, warehousing, handling and / or other duties.

It must therefore follow that CAF would arrange for the cargo to be offloaded at Cape Town harbour, cleared through customs, they would have to unpack it so that it was ready for collection and that the costs would be for the account of the applicant. It is common cause that the applicant did not pay CAF for the unloading of the cargo in Cape Town and the landslide services required in order for the cargo to be collected. The landslide services and the charges therefore included Transnet terminal services, payment of the cargo dues, the haulage of the cargo from the port to the depot, EDI submissions to SARS, the unpacking of the container, the storage of the cargo, returning the empty container to the port, releasing the cargo to the consignee and loading the cargo onto the consignee's vehicle.

From the evidence before me it is clear that the first

respondent and Thrutainers International have duly performed those landslide services which entitle them to charge for those services. It is also clear from the last invoice rendered by CAF to the applicant that the customer, that is the applicant, was responsible for the pick-up from the port and paying any duties and taxes, clearance and handling fees. In any event, even if BIT was not authorised to instruct the first respondent and / or Thrutainers International to perform the landslide services and to recover from the applicant the landslide charges, I am satisfied that under the common law the first respondent and Thrutainers have a lien to secure charges for storing the goods and in respect of acting as a clearing agent.

The applicant today, belatedly, conceded that the first respondent and Thrutainers acted in terms of a valid binding contract but he denies that he is indebted to them as he now avers that since his goods were shipped "express release", meaning, if I understand him correctly, that they should have been released by the first respondent and Thrutainers and SARS immediately as he had paid in full. This is a new argument raised by the applicant for which I can find no support for in the papers. I am satisfied that this argument is an, after the fact, last straw attempt on his part to escape his liability to both first respondent and SARS.

I agree with the first respondent and the second respondent that the applicant knew that his cargo could only be unpacked at the customs license container depot in terms of section 11 of the Customs and Excise Act 91 of 1964 and that the cargo could only be collected from the customs license container depot where the goods had been transported to. On the evidence I am further not persuaded that the applicant is being double charged for separate services rendered to him by first respondent and / or Thrutainers. In any event, should the first respondent or Thrutainers ever decide to institute civil action against him for the recovery of their respective charges, the court dealing with that matter must in fact deal with the disputes arising out of it.

I am satisfied on the evidence that Thrutainers International made it quite clear to the applicant what their role was, what the requirements of the Act was, and why they needed to be paid for their services. It seems logical that the applicant's clearing agent would and must have known about the procedures involved and the fact that first respondent and Thrutainers were in fact entitled to their charges. The evidence show that the applicant's clearing agent did not dispute the charges. There is in fact no version of the applicant's clearing agent before me except the averments that the applicant has made in court.

In the circumstances the first respondent cannot be faulted for retaining the goods in storage in order to protect the goods from damage, loss or theft. I am satisfied that the first respondent behaved correctly and in accordance with the procedures set out in section 38 and section 43(1)(a) of the Customs Act as it was obliged to when it delivered the goods to the State Warehouse on 4 February 2012. I reiterate that in my view the first respondent and Thrutainers have a valid lien over applicant's goods until such time as the amounts due and owing to them have been paid in full.

I come to deal with the involvement of SARS. Ms Enslin contended that the application is vexatious and frivolous and that the applicant is motivated by ulterior and bad faith motives. She submitted that the applicant must know full well that there is an obligation upon him to pay taxes and duties relating to the goods which he brought back to South Africa. She referred in this regard to the Legislation which is relevant to this particular issue. Before dealing with the Legislation, I think it is important to note that, first of all that the applicant arrived back in South Africa on 12 July 2010; and secondly his good arrived in South Africa two years after his initial arrival and that was on 28 December 2012.

In terms of the Customs Act, a resident returning to the Republic of South Africa is able to clear his household goods under rebate which would mean that no taxes and duties would be payable. The returning resident must however comply with the relevant rebate item and the notes thereto. In this regard I refer to rebate item 407-06 which provides for household effects and other articles returned for own use. Item 407-06 reads as follows:

> "Household furniture, other household effects and other removable articles, including equipment necessary for the exercise of the calling, trade or profession of the person, other than industrial, commercial or agricultural plant and excluding motor vehicles, alcoholic beverages and tobacco goods, the bona fide property of a natural person (including a returning resident of the Republic after an absence of six months or more) and members of his or her family, imported for own use on change of his or her residence to the Republic: provided these goods are not disposed of within a period of six months from the date of entry."

It is clear that it is necessary that the household and personal

effects must be brought into the country within six months after the resident himself returned. On the facts of the matter, I find that the rebate item 407-06 is inapplicable. It therefore follows that in terms of the law the importation of the applicant's goods must attract liability for payment of taxes and duties. The applicant applied for an extended rebate in respect of the goods and simultaneously on 14 December 2012 submitted four applications to the International Trade Commission of South Africa for Imports to import various second hand goods.

In respect of his personal goods, for reasons of his own, the applicant did not disclose that his goods would arrive two years after he had already arrived. It is clear to me that the permits that were originally issued to the applicant were based on the fact that the rebate did in fact apply. On 22 January 2013 the commission was however informed by the applicant's clearing agent, Portia May, of Inline Freight, that a permit was required due to the time factor. It is quite clear that she realised that the applicant faced a problem. Based on that the commission then issued seven import permits to the applicant, which had the effect that the rebate item was not available and that an importation permit had to be procured from the commission and that the applicant was therefore in the circumstances liable for those duties and taxes that had to be

paid in terms of the law.

Ms Enslin has carefully outlined the relevant provisions and the law in her argument and I do not intend to repeat them. On a consideration of the provisions of the Customs Act, which provide for the prohibition and control of the importation, export, manufacture or use of certain goods, I am satisfied that the Act would in fact apply to the importation of personal goods as well as the computers that have been referred to. In my view, the applicant's argument that the Consumer Protection Act 68 of 2008 applies to this matter cannot succeed. The evidence clearly shows on his own version that the applicant brought goods into the Republic of South Africa.

The Customs Act provides for payment of customs duties and / or taxes on the importation of the goods. It therefore follows that on his own version the applicant is liable to SARS for payment of the importation duties and taxes in regard to the personal goods that he brought into the country. The applicant further cannot even assert that he was not aware what the first respondent intended to do if he did not pay for its services. He was advised by 31 January 2013 that his goods would be moved to the State Warehouse from their bonded warehouse. He knew his goods would not be released from the State Warehouse unless payment of the charges which related to the

registration of the lien applied.

The goods have been in the State Warehouse since 4 February 2013 up until now. To date the applicant has still not complied with the provisions of the Customs Act. In addition to the non-payment of the first respondent's charges, the goods then clearly also attracted customs duties and VAT. SARS have advised the applicant about the provisions of the Act. In terms of section 38(1)(a) of the Customs Act, the goods must be cleared within seven days from importation. Should this not happen, the goods must be detained, seized and can be declared forfeit and destroyed. [See also in this regard section 43(3) of the Act.].

Section 107(1) and (2) specifically provide that no goods will be released until there has been compliance with the provisions of the Act. The applicant has been aware of this since March 2013. Instead of attempting or trying to resolve the matter in a reasonable and proper manner, he has rather elected to make unfounded and sweeping statements against SARS, first respondent and Thrutainers about a conspiracy against him. I have looked at the papers. I cannot find any evidence whatsoever of a conspiracy and in the circumstances these allegations fall to be rejected.

I reiterate that SARS and the Customs Department have acted completely within their rights and in accordance with the law. Regrettably the applicant, through his own conduct, has been the author of his own misfortune and the situation that he finds himself in. I further find that there is no merit in the applicant's second complaint against SARS which relate to his alleged importation of the computerised equipment which he supplies to the education department. On the evidence before me this complaint has been investigated and resolved prior to the launch of this application when the applicant passed a voucher of correction on 22 April 2013, amending the value of the computers imported and the applicant paid SARS an amount in relation to the importation of those goods.

When one considers the applicant's complaints on the whole, then it seems to me that they are in fact directed at the wrong entities. On the face of it it seems to me that his complaint must lay against Craters and Freighters, who did his shipping. It seems as if he averred at one stage that they had deceptively added a line item for payment of duties and the taxes and / or clearance or handling fees. In any event, the applicant's attempts to assert that he was under the impression that if he paid Craters and Freighters their agreed fee, that he would not have to pay any further costs to uplift his personal goods from Cape Town harbour can simply not be

correct. I am satisfied that he knew this. Any reasonable business man with his years of experience would have known this. If there is any merit in the allegation that Craters and Freighters have defrauded and / or misled the applicant, then he must proceed against them. In regard to the applicant's claim that he should be awarded punitive damages in the amount of R1 million against the respondents for his lost time and emotional stress, I find that there is no basis on the facts or the law for such a claim. Apart from the fact that the claim is not properly quantified, it is clear that the applicant has brought his suit in the wrong manner and that he should have proceeded by way of action procedure. That being said, I am of the view that such an action would on the present facts be frivolous and without substance.

I am going to deal briefly with certain of the points *in limine* that had been raised by the respondents. There is merit in some of the points of *limine* that have been raised by the respondents which could in fact result in the applicant's application being dismissed. I do not intend to deal with all the points raised and in any event I do not think it is necessary to rely on them considering the conclusion that I come to.

In the main the applicant has based his complaints by placing reliance on the Consumer Protection Act 68 of 2008. The

charges against the first respondent and Thrutainers and SARS are set out on pages 14 to page 29 in the applicant's "affidavit". It is unnecessary to repeat it at this stage. What is however clear is that section 115(2)(b) of the Consumer Protection Act provides that prior to the institution of proceedings the applicant was obliged to first file with the Registrar a notice from the chairperson on the tribunal in a prescribed form firstly certifying whether the conduct constituting the basis for the action has been found to be a prohibited or required conduct in terms of this Act. Secondly, stating the date of the tribunal's finding, if any and thirdly, setting out the section of this Act in terms of which the tribunal made its finding, if any.

The applicant has failed to comply with the provisions of section 115(2)(b) of the Act and he has failed to file same with the Registrar. For this reason therefore, the application is premature and non suited due to his failure to comply with the peremptory provisions of the Act. I cannot rely on the contents of the email of Ashley Searl. At most, in my view, it amounts to hearsay. I have no version from Ashley Searl before me. There is no reason why Mr Searl did not depose to an affidavit in this matter considering the length of time that this matter has taken to come to this stage where we are now.

Even though it was further contended on behalf of the first respondent and SARS that the applicant has served and filed unsworn affidavits and annexures and that the applicant does not comply with the provisions of Rule 6(1) of the Rules of Court, I do not intend to hold this against the applicant. In respect of the further respondent it further appears that the applicant has also instituted the proceedings out of the incorrect court and that such proceedings ought to have been instituted either out of the Kwazulu Natal High Court, Durban or the Kwazulu Natal High Court, Pietermaritzburg, considering where their principal place of business is situated.

Finally, as far as the points *in limine* are concerned, it was contended that the applicant did not comply with the provisions of section 96(1)(a)(i) of the Customs and Excise Act 91 of 1994. Section 96(1)(a)(i) of the Customs and Excise Act 91 of 1994 provides that:

> "No process by which any legal proceedings are instituted against the State, the Minister, the Commissioner or an officer for anything in pursuance of this Act may be served before the expiry of a period of one month after the delivery of a notice in writing setting forth clearly and "explicitly" the cause of action, the name and

> place of abode of the person who is to institute such proceedings (in this section referred to as the "litigant") and the name and address of his or her attorney or agent, if any."

The provisions of section 96 are peremptory. The applicant has failed to provide SARS with the prescribed notice. Ms Enslin has referred the Court to the unreported case of Hisense SA Development Enterprises (Pty) Limited and The Commissioner for SARS and Another, case number 77081/2011 and she has argued that that case is authority for her argument that the applicant's application falls to be dismissed due to non-compliance with section 96(1)(a)(i) of the Customs and Excise Act 41 of 1991.

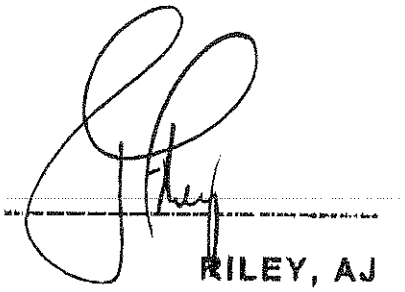
The applicant has argued that that case was not authority and that in his view he was not precluded from bringing his application within a year. I do not agree with the applicant. The legal position is clear and on the evidence before me I must find that the applicant has failed to provide SARS with the prescribed notice.

Even if I accept and even if I agree with the applicant that the Consumer Protection Act is an excellent piece of Legislation, and that it is there to protect the public, it does not mean that

the provisions of that Act override the provisions of the Customs and Excise Act.

In the present matter I am satisfied that the provisions of the Customs and Excise Act do apply and that they are in fact legally enforceable and binding on the applicant. Having heard argument and having considered the papers, I am not persuaded that the applicant's application can succeed. The balance of probabilities favours the respondents overwhelmingly.

THE APPLICANT'S APPLICATIONS ARE ACCORDINGLY DISMISSED WITH COSTS, INCLUDING THE COSTS OF COUNSEL.



RILEY, AJ