



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 186/12
Not Reportable

In the matter between:

CLEARFREIGHT (PTY) LTD

APPELLANT

and

PICTECH SALES CC

RESPONDENT

Neutral citation: *Clearfreight (Pty) Ltd v Pictech Sales CC* (186/12) [2013]
ZASCA 181 (29 November 2013).

Coram: Mthiyane AP, Maya, Leach and Saldulker JJA and Meyer AJA

Heard: 18 November 2013

Delivered: 29 November 2013

Summary: Contract of deposit – whether depositor proved delivery to depository of goods alleged to have been lost in storage.

ORDER

On appeal from: Full Bench of the South Gauteng High Court (Masipa J and Coppin J concurring):

- (a) The appeal is upheld with costs.
- (b) The order of the high court is set aside and is substituted with the following:
‘The appeal is dismissed with costs.’

JUDGMENT

Meyer AJA (Mthiyane AP, Maya, Leach and Saldulker JJA):

[1] The appellant, Clearfreight (Pty) Ltd (Clearfreight), conducts business as a clearing and forwarding agent although it also offers additional services including the warehousing of goods. The respondent, Pictech Sales CC (Pictech), is an importer of goods and a former client of Clearfreight. This appeal concerns Pictech’s claim against Clearfreight for the value of goods alleged to have been lost in storage.

[2] Import clearing and forwarding services were provided to Pictech in terms of a written agreement concluded on 28 April 1998, which agreement incorporated Clearfreight’s ‘Standard Trading Conditions’ (the written agreement). Initially, the services provided by Clearfreight related to air-conditioning units that Pictech imported from China. Pictech later resolved to extend its business to include the importation of ‘soft drawn copper tubing’, also from China. Because it did not have secure facilities to store the copper tubing, Pictech’s sole member, Mr M Shek, arranged with a representative of Clearfreight, Mr H Lee, for Clearfreight to store its copper tubing, once

forwarded and cleared. These additional warehousing services were provided to Pictech from the end of June 2003.

[3] Pictech's Mr IM Parker, for reasons that are not presently relevant, became concerned about the security at the premises at which Clearfreight was storing the copper tubing. He accordingly undertook a stock count at the warehouse on 27 January 2004. The following day he advised Clearfreight's managing director, Mr W Claassen, by e-mail that the 'actual' and 'theoretical' stock revealed 'large differences'. Pictech ultimately resolved not to conduct any further business with Clearfreight. And it deducted an amount of R68 447.37 from the amount which it owed Clearfreight in respect of its services and the disbursements for the months December 2003 and October 2004, this being the alleged value of its copper tubing that 'went missing' from the appellant's warehouse. The parties referred to the alleged loss as 'under receipting' by Clearfreight of the goods in question. I adhere to their terminology.

[4] The loss complained of relates to two consignments, referred to as CU101 and CU104. Pictech purchased the copper tubing from a Chinese manufacturer, Henan Golden Dragon Precise Copper Tube Inc (the manufacturer). Clearfreight acted as Pictech's freight clearing and forwarding agent in respect of both consignments and it appointed Formosa Transportation Co., Ltd as its agent in China. Each consignment was loaded into a 24 m³ container. The containers were allegedly sealed and transported from Henan to Tianjing P.R., China. During June 2003 the container containing consignment CU101 was shipped by the Mediterranean Shipping Company to Durban. In November 2003 consignment CU104 similarly shipped to Durban. Both consignments were received by Clearfreight in Durban and transported to its premises in Johannesburg, where the seal of each was broken for the first time. The containers were unpacked and the copper tubing stored in Clearfreight's warehouse until collected by the respondent. Pictech asserted that the records of Clearfreight of what it had received into its warehouse in respect of consignments CU101 and CU102 reflect less kilograms copper tubing than what had in fact been packed in the

containers by the manufacturer and that there was accordingly an 'under receipting' by Clearfreight of the goods comprising the two consignments.

[5] Clearfreight did not accept being liable to Pictech. Instead, it instituted the action against Pictech in the magistrates' court, Randburg claiming payment of the sum of R69 701.36, interest and costs. Pictech acknowledged its liability to Clearfreight in the sum of R68 447.37, but in a counterclaim claimed payment of that amount from Clearfreight which amount it alleged represents the damages it had suffered as a result of Clearfreight's breach of an oral agreement concluded on 3 June 2003 between Pictech, represented by Shek, and Clearfreight, represented by Lee, in terms of which the warehousing services were provided. Clearfreight, on the other hand, asserted that all its services were provided to Pictech in terms of the written agreement. It is common cause that if the warehousing services were provided subject to Clearfreight's standard trading conditions its liability would be limited to loss caused as a result of gross negligence or fraud.

[6] At first instance, by agreement between the parties the magistrate's court ruled, pursuant to rule 29(4), that three questions be adjudicated separately: (a) whether the warehousing services that were provided by Clearfreight to Pictech during the period June 2003 until February 2004 were provided in terms of the written agreement as alleged by Clearfreight, in which event the standard terms and conditions annexed thereto applied, or whether such services were provided in terms of the oral agreement as alleged by Pictech; (b) whether there was under receipting by Clearfreight of the goods in the consignments identified as CU101 and CU104; and (c) in the event of the question in regard to whether the services were provided in terms of a written agreement being decided in favour of Clearfreight and it being found that Clearfreight had under receipted the goods, whether such under receipting was a result of gross negligence or theft.

[7] Pictech argued that the question of its loss was dispositive of the matter. This argument seems to me to be sound. Pictech conceded being liable to pay to Clearfreight the sum of R68 447.37 and sought to avoid paying

that sum by setting off its alleged loss against it. Clearfreight waived the difference between the amount it claimed and the amount of Pictech's admitted liability and accordingly, it would not matter whether the warehousing services had been provided in terms of the written agreement or a subsequent oral agreement if Pictech's alleged loss was not proved.

[8] The court of first instance decided each question in favour of Clearfreight. It granted judgment in its favour against Pictech for payment of the sum of R68 447.37 plus interest and costs and it dismissed Pictech's counterclaim with costs. On appeal the South Gauteng High Court (Masipa J and Coppin J concurring) held a different view. In upholding the appeal with costs it decided questions (a) and (b) in Pictech's favour. The present appeal is with the leave of this court.

[9] Taking the cue from Pictech's submission at first instance, I propose to first consider the question whether Pictech has proved on a preponderance of probabilities that there was under receipting by Clearfreight of the copper tubing comprising consignments CU101 and CU104.

[10] The dispute relating to those consignments only relates to copper tubing with dimensions 12.7 mm x 0.6 mm x 15 m. Parker's evidence is to the effect that in loading a container, 20 boxes of copper tubing (5 layers of 4 boxes each) are packed onto a pallet and shrink wrapped. If necessary, empty boxes are used to complete the cube of twenty boxes. In establishing Clearfreight's 'receipting' of the goods, Pictech relied solely on Clearfreight's own records, which include stock lists prepared at the time of unpacking the containers, collection notes and a schedule or reconciliation of goods received and collected by Pictech.

[11] Regarding consignment CU101, the records reveal that Clearfreight received a total of 18 pallets on which 344 boxes were packed. Included were 60 boxes (three pallets) containing the 12.7 x 0.6 x 15 copper tubing. Parker calculated the net weight of this consignment as per Clearfreight's records at 9 950.80 kilograms. In the case of consignment CU104, it received a total of

18 pallets on which 360 boxes were packed. Included were 40 boxes (two pallets) containing the 12.7 x 0.6 x 15 copper tubing. Parker calculated the net weight of this consignment at 9 562.00 kilograms.

[12] Pictech asserted that there was under receipting by Clearfreight of 20 boxes (1 pallet) of 12.7 mm x 0.6 mm x 15 m copper tubing (a net weight of 905.30 kilograms) in respect of consignment CU101, and 40 boxes (2 pallets) copper tubing with those dimensions (a net weight of 1 464 kilograms) in the case of consignment CU104. In order to establish its assertions, and particularly what had been packed into the containers in China, Pictech relied on what purports to be: (a) the manufacturer's 'commercial invoice' dated 9 May 2003 and the manufacturer's 'packing list' in respect of consignment CU101; (b) the manufacturer's 'commercial invoice' dated 3 November 2003 in respect of consignment CU104; and a letter from the manufacturer dated 01 March 2004, which reads:

'We herewith confirm that:

- 1) our shipment for Pictech with order number Cu101, shipped by FORMOSA TRANSPORTATION CO., LTD, on the 5th June 2003, from Tianjing P.R. China to Johannesburg, RSA, the total net weight is 10 856.10 KGS, gross weight 12 167 KGS, measurement 24.00 m³, with total 19 clean Pallets. The detail can be referred to our packing list.
- 2) our shipment for Pictech with order number Cu104, shipped by FORMOSA TRANSPORTATION CO., LTD, on the 26th November 2003, from Tianjing P.R. China to Johannesburg, RSA, the total net weight is 11 130.69 KGS, gross weight 12 669.5 KGS, measurement 24.00 m³, with total 20 clean Pallets. The detail can be referred to our packing list.'

[13] Other documents referred to are a Bill of Lading, Shipped on Board Details that appears to have been prepared by the Mediterranean Shipping Company, and a Bill of Entry in respect of each consignment. The undisputed evidence, however, is that the information regarding the weight and number of pallets of each consignment reflected in these documents emanated from the information contained in the manufacturer's invoices and packing lists. The information was merely carried over from document to document. The

containers were sealed after they had been loaded in China and the seals were only broken once the containers had arrived at Clearfreight's premises in Johannesburg.

[14] The correctness of the details of each of the disputed consignments reflected in the manufacturer's documents has not been proven. We are accordingly faced with conflicting documents as to what was allegedly consigned and that which Clearfreight recorded as having been received. There is, in my view, no reason why the documents of the manufacturer should be preferred to those of Clearfreight. Either the employees of the manufacturer or those of Clearfreight might have recorded false or mere incorrect information. I conclude therefore that loss on the part of Pictech has not been proved on a preponderance of probabilities.

[15] In the circumstances Pictech failed to prove that there had indeed been an under-receipting on the part of Clearfreight or, more accurately, that goods it had received on Pictech's behalf had gone missing from its warehouse. It therefore failed to prove its counterclaim and its admitted liability in respect of the sum of R68 447.37 has not been displaced. The court of first instance thus correctly found in Clearfreight's favour and the court of appeal erred in allowing Pictech's appeal.

[16] In the result the following order is made:

- (a) The appeal is upheld with costs.
- (b) The order of the high court is set aside and is substituted with the following:

'The appeal is dismissed with costs.'

P A MEYER
ACTING JUDGE OF APPEAL

APPEARANCES:

For Appellant:

B D Hitchings

Instructed by:

Breytenbach Mostert, Pretoria

Vermaak & Dennis, Bloemfontein

For Respondent:

M D Silver

Instructed by:

Darryl Furman & Associates, Johannesburg

Matsepes, Bloemfontein