REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA

(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

Exercising its Admiralty Jurisdiction

CASE NO.: AC166/2003

Name of Ship: **MV "AMBER LAGOON"**

In the matter between:

FRESHGOLD SA EXPORTS (PTY) LTD Plaintiff

and

MARITIME CARRIER SHIPPING GmbH and CO Defendant

JUDGMENT DELIVERED ON 15th DECEMBER 2005

VELDHUIZEN, J:

1] In this action the plaintiff claims damages from the defendant for the breach of an oral contract. Prior to the commencement of the trial and by agreement

between the parties an order was granted that the following two issues be determined separately and prior to all other issues in the action:

- the material terms of the contract between the plaintiff and the defendant;
- whether the plaintiff ceded its contractual rights against the defendant as envisaged by section 4(2) of the Sea Transport Documents Act 65 of 2000 with the effect that the plaintiff is not possessed of any relevant contractual rights against the defendant.

2] The common cause or at least uncontested facts are fairly simple.

[2.1] On 27 November 2002 Nadia Ammerman of Opus Export, plaintiff's clearing and forwarding agent, orally instructed Michelle Martin of King and Sons, defendant's ships' agent tot carry one 40 foot refrigerated container containing fruit (peaches and apricots) at -0,5ºC from Cape

Town to Rotterdam;

[2.2] It was further agreed that:

[2.2.1] the defendant would make available the container to enable the plaintiff to pack it with the fruit at -0,5ºC;

[2.2.2] the defendant would procure the carriage of the container with the fruit from Cape Town on board the MV "Grey Fox" which was due to depart on 30 November 2003;

[2.2.3] the container would maintain the fruit at substantially -0,5ºC during its carriage until unpacked at Rotterdam;

[2.2.4] Once the container was loaded on board an ocean going vessel in Cape Town the defendant would issue its standard form bill of lading and make it available to the plaintiff; and

[2.2.5] the plaintiff would pay to the defendant an agreed freight charge for the defendant's services;

[2.2] The container was supplied to the plaintiff and

the fruit was packed into it;

[2.3] The container was transported to Cape Town harbour and was later loaded onto the MV “Grey Fox”;
[2.4] The container malfunctioned and the temperature rose to an unacceptable level;
[2.5] The container was removed from the MV “Grey Fox” and the fault was repaired;
[2.6] The container was thereafter loaded onto the MV “Amber Lagoon”;
[2.7] The MV “Amber Lagoon” left Cape Town on 12 December 2002 and arrived in Rotterdam on 31 December 2002;
[2.8] On arrival in Rotterdam it was found that the fruit had suffered the effects of decay and mould which required its speedy sale at reduced prices.

[2.9] The deterioration in the quality of the fruit probably occurred before it was loaded onto the MV “Amber Lagoon”.

[2.10] Defendant’s standard terms and conditions appear from its bill of lading which is annexed to its plea.

[3] The defendant avers that the agreement of the parties is governed by the terms contained in the bill of lading and more particularly clauses 5 and 16(1)(b) thereof. The relevant parts of these clauses read:

“5. CARRIER’S RESPONSIBILITY”

Port to Port Shipment

. . .

The carrier shall be under no liability whatsoever for loss of or damage to the goods, howsoever occurring if such loss or damage arises prior to loading onto or subsequent to discharge from the vessel. . . .”

“16. METHODS AND ROUTES OF CARRIAGE

1) The carrier may at any time and without notice to the Merchant

(a) . . .

(b) Transfer the goods from one conveyance to another including but not limited to transhipping or carrying them on another vessel than that named on the face hereof

(c) , (d), (d), (f), (g)’

[4] The plaintiff denies that it is bound by clauses 5 and 16(1)(b) of the bill of lading. In its reply to Defendant’s Request for Further Particulars to

the Plaintiff's Particulars of Claim the plaintiff states:

> 'The rights and obligations of the parties as regards the loading, carriage, discharge and delivery of the container and fruit would be subject to those terms and conditions of defendant's bill of lading which relate to the loading, carriage, discharge and delivery of the container and fruit. Save for the aforegoing the plaintiff makes no admissions regarding the aforegoing sub-paragraphs".

The 'sub-paragraphs' include clauses 5 and 16(1)(b) of the defendant's bill of lading.

[5] That a bill of lading itself does not constitute the contract between the parties is trite law. In *The "Ardennes"* [1950] KB 340 Goddard LCJ held on

p344:

‘It is, I think, well settled that a bill of lading is not in itself the contract between the shipowner and the shipper of goods though it has been said to be excellent evidence of its terms - Sewell v Burdick, 10 App. Cas. 74, at p. 105, per Lord Bramwell; Crooks & Co. and Another v Allan and Another, 5 Q.B.D. 38. The contract has come into existence before the bill of lading is signed; it is signed by one party only and handed by him to the shipper usually after the goods have been put on board. No doubt if the shipper finds it contains terms with which he is not content or does not contain some term for which he has stipulated, he might if there were time demand his goods back; but he is not in my opinion for that reason prevented from giving evidence that there was in fact a contract entered into before the bill of lading was signed different from that which is found in the document or containing some additional term. He is no

party to the preparation of the bill of lading nor does he sign it.'

[6] Mr Peter von Maltitz, the plaintiff's managing director, testified that when a 'booking' is made he expects that a bill of lading would be issued in due course. He also expected that it would contain the defendant's standard terms.

He also testified that he could not imagine that they would contract on a basis that the carrier would not be liable for a defective container. This was the high water mark of his evidence. It is, however, clear that neither he nor his agent agreed to terms which are contrary to those contained in the bill of lading.

[7] In *Pyrene Company, Limited v Scindia Steam Navigation Company, Limited* [1954] Vol 1 QB 321 it was held on p 329:

'When parties enter into a contract of carriage in the expectation that a bill of lading will be issued to

> cover it, they enter into it upon those terms which they know or expect the bill of lading to contain. Those terms must be in force from the inception of the contract; if it were otherwise the bill of lading would not evidence the contract but would be a variation of it. Moreover, it would be absurd to suppose that the parties intend the terms of the contract to be changed when the bill of lading is issued: for the issue of the bill of lading does not necessarily mark any stage in the development of the contract, often it is not issued until after the ship has sailed, and if there is pressure of office work on the ship's agent it may be delayed several days. In my judgment, whenever a contract of carriage is concluded and it is contemplated that a bill of lading will in due course be issued in respect of it, that contract is from its creation 'covered' by a bill of lading and is therefore from its inception a contract of carriage within the meaning of the Rules and to which the Rules apply (own emphasis).

[8] In my view this statement of the law is not much

different, if at all, from our own. In *Afrox Healthcare Beperk v Strydom* 2002(6) SA 21 (SCA) Brand JA, decided on p 42 B-D:

'[36] Die antwoord hierop is dat die respondent se subjektiewe verwagtings oor wat die kontrak tussen hom en die appellant sou bevat, geen rol te speel het by die vraag of daar 'n regsplig op Buitendag was om klousule 2.2 aan hom uit te wys nie. Wat wel by hierdie vraag van belang is, is of 'n bepaling soos klousule 2.2 redelikerwys te wagte was, oftewel of dit objektief gesproke onverwags was. Soos ek reeds vroeër aangedui het, is vrywaringsklousules soos klousule 2.2 hedendaags in standaard kontrakte eerder die reël as die uitsondering. Ondanks die respondent se betoog tot die teendeel kan ek ook geen rede sien om in hierdie opsig privaathospitale in beginsel van ander verskaffers van dienste te onderskei nie. Derhalwe kan nie gesê word dat 'n bepaling soos kloule 2.2 in die toelatingsdokument objektief gesproke onverwags was nie. Bygevolg was daar geen regsplig op Buitendag om dit pertinent onder die respondent se aandag te gebring het nie. Derhalwe is die respondent aan die terme van die klousule gebonde asof hy dit gelees en uitdruklik daartoe ingestem

het.'

[9] Clauses 5 and 16(1)(b) of the bill of lading contain terms which are, presently commonly found in bills of lading. The plaintiff expected to receive the defendant's standard form bill of lading and, in my view, expected or at the very least should have expected to find terms such as clauses 5 and 16(1)(b) therein. The plaintiff is, therefore, bound by all the terms of the bill of lading issued by the defendant. It follows that the defendant was entitled in terms of clause 16(1)(b) of the bill of lading to transfer the container to the MV "Amber Lagoon" and that it is further entitled to the protection of clause 5 of the bill of lading. For these reasons the plaintiff's claim is dismissed with costs.

[10] In view of this result it is unnecessary for me to decide the second issue mentioned in paragraph 1.

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A.H. VELDHUIZEN