IN THE KWAZULU-NATAL HIGH COURT, DURBAN
REPUBLIC OF SOUTH AFRICA
(Exercising its Admiralty Jurisdiction)

Name of Ship: MV "LYKES RUNNER"

CASE NO. A11/2006

In the matter between:

LYKES LINES LIMITED, LLC PLAINTIFF

and

VEREENIGING MEAT PACKERS DEFENDANT

Admiralty action *in personam*

JUDGMENT Delivered on 30 October 2009

SWAIN J

[1] The present dispute arose out of the hi-jacking of a truck transporting a reefer container, en route from the port of Durban, to the premises of the defendant in Vereeniging. The plaintiff claims payment of the sum of US$21,602.25 from the defendant, being the value of the container.

[2] The following facts are either common cause, or not disputed by the defendant.

[2.1] The plaintiff received a reefer container, number GESU 9171436 for ocean carriage from Montreal on board the M V "Lykes Runner" to the port of Durban under Bill of Lading No. YMQRLO12970.

[2.2] The carrier's conditions of carriage contained in the bill of lading included *inter alia* the following clause 6 (b) (1)

"If Containers supplied by or for the Carrier are unpacked at the Merchant's premises, the Merchant is responsible for returning the empty Container in working condition with interiors brushed and cleaned. The Containers must be returned to the point or place designated by the Carrier within the time prescribed failing which the Merchant will be liable for all resulting direct, incidental and consequential damages including demurrage, detention and per diem charges, however designated".

[2.3] Impson Freight (Pty) Ltd. (hereafter referred to as Impson), acting as the clearing agents of the defendant, took delivery of the container from the plaintiff, on discharge of the container at the port of Durban.

[2.4] Impson received the documents headed "Importers Clearing Instructions" from the defendant, which specified that the container was to be delivered to the defendant's address.

[2.5] Impson completed the document headed "Cartage Instruction" indicating who the transporter of the container was, where it was to be delivered and to which depot of the plaintiff it was to be returned. This was as a result of Impson having selected "Merchant Haulage" rather than "Carrier Haulage" on behalf of the defendant in the

document at page 46 of Exhibit "C", addressed to the plaintiff, which also recorded that the container was to be returned to the Durban depot of the plaintiff. Mr. Impson, who gave evidence on behalf of Impson, stated that although Impson had not been given specific instructions by the defendant to select the particular haulier, namely Pascal Logistics in respect of the container in issue, they had previously done work for the defendant and always selected this haulier.

[2.6] The effect of the document headed "Cartage Instruction" was that Impson, acting on behalf of the defendant, instructed Pascal Logistics to pick up the container from Durban, take it to the City Deep Cold Storage in Johannesburg and then return it to the United Container Depot in Durban.

[2.7] A document styled a "Container Terminal Order" was needed to release the container from the port. This document, which appears at page 47 of Exhibit "C", was stamped by "Mitchell Cotts" as agent for the plaintiff, indicating the plaintiff's assent to its terms, as well as the release of the container. This document specified the following:

"Empty container to be delivered to - United Cont Depot Rotterdam Road Bayhead Dbn 622708"

This document was presented by Impson on behalf of the defendant and the "turn-in" address for the container was supplied by the plaintiff.

[2.8] At the time of the loss of the container it was owned by G E SeaCo Services Ltd. and leased to Container Equipment Leasing Ltd. (hereafter referred to as CEL), in terms of a lease agreement which was identified by Mr. Phillips. He stated that the object of the lease agreement was to lease containers by CEL, a wholly owned subsidiary of C P Ships (UK) Ltd. which also owned all of the shares in the plaintiff, as well as other shipping lines. Consequently, containers leased by CEL would be allocated for use by the various shipping lines owned by C P Ships (UK) Ltd.

[2.9] Clause 6 of this lease agreement provided that the replacement value for each container damaged beyond economic repair, lost or destroyed was US$21,000.00.

[2.10] Clause 10 of the lease agreement provided that at the request of the lessee, being CEL, the invoices of G E SeaCo Services Ltd. for rent and other charges would be invoiced to C P Ships (UK) Ltd.

[2.11] Mr. Phillips stated that the provisions of Clause 10 were in accordance with an internal arrangement which was in place at all times between CEL, C P Ships (UK) Ltd. and the plaintiff (as well as other shipping lines owned by C P Ships (UK) Ltd.). The arrangement was that any loss of a container by one of the shipping lines, including the plaintiff, on lease by CEL from G E SeaCo Services Ltd., would be paid for by C P Ships (UK) Ltd., who would then recover the amount from the shipping line concerned. He stated that when lost, the container in question had been allocated to the plaintiff, on whom the final financial loss rested.

[3] Counsel were agreed that only two issues arose for decision to determine the liability of the defendant, to compensate the plaintiff for the loss of the container. In this regard Counsel were agreed that the issue of quantum would no longer be treated as a separate issue, as the value of the container was no longer in dispute.

[4] The first issue to be decided is the *locus standi* of the plaintiff to claim for the loss sustained. Although described as such, it is apparent that this is a misnomer because the *locus standi* of the plaintiff arises out of the bill of lading, referred to above, which it is common cause, governed the contractual relationship between the plaintiff and the defendant, at the time of the loss. The real issue is whether the plaintiff has established that it suffered the financial loss, occasioned by the loss of the container, in terms of the internal arrangement described by Mr. Phillips.

[5] Mr. Shepstone, who appeared for the defendant, submitted that the evidence of Mr. Phillips in this regard was inadmissible, as it violated the *parol* evidence rule as it sought to modify, add to or contradict the terms of the lease agreement, which provided that CEL was the lessee and liable to compensate the lessor, G E SeaCo Services Ltd. for the loss of the container. I disagree. The terms of the so-called "internal arrangement" have no effect upon the rights and obligations of the parties to the lease. G E SeaCo Services Ltd., the lessor and owner of the container, agreed to invoice C P Ships (UK) Ltd. for the rent "and other charges due

hereunder". In other words, G E SeaCo Services Ltd. and CEL agreed in terms of the lease, that G E SeaCo Services Ltd. would recover any amounts due by CEL, from C P Ships (UK) Ltd. This would obviously include charges arising from the loss of the container, as envisaged by Clause 6. The fact that C P Ships (UK) Ltd. was then entitled to recover the amount it paid to G E SeaCo Services Ltd. from the plaintiff, does not effect the terms of the lease, nor the rights and obligations of the parties to the lease.

[6] Even if the provisions of Clause 10 of the lease are ignored, it seems to me that the terms of the so-called internal arrangement are nothing more, nor less, than a collateral oral agreement extrinsic to and not in conflict with the terms of the lease. The effect of such an "arrangement" is simply that C P Ships (UK) Ltd. agreed to discharge any indebtedness of CEL to G E SeaCo Services Ltd. for the loss of a container, with a subsequent right of recovery from the plaintiff.

[7] I am therefore satisfied that the plaintiff has established that it suffered financial loss, as a result of the loss of the container.

[8] The second issue to be decided is whether on a correct interpretation of Clause 6 (b) (1) of the bill of lading, as set out in paragraph [2.2] *supra*, the defendant is liable to compensate the plaintiff for the financial loss it suffered.

[9] Mr. Shepstone submitted that the provisions of this clause were in their entirety subject to its first sentence. In other words, an obligation upon the defendant, as the "Merchant" in terms of the bill of lading, to return the container "to the point or place designated by the Carrier" only arose if the container was unpacked at the premises of the defendant. In my view, the meaning of the first sentence, read in the context of the clause as a whole, is simply that the merchant is liable to return the container in working condition, with the interior brushed and clean, if the Merchant unpacks the container at its premises. The Merchant is not absolved from the duty to return the container to the point or place designated by the Carrier, simply because the Merchant does not unpack the container at its premises. In fact, it incurs the additional responsibility of ensuring that the container is brushed, cleaned and in working condition if it does so.

[10] In my view, Clause 6 (b) (1) of the bill of lading accordingly does not absolve the defendant from liability to compensate the plaintiff, for any loss suffered by the plaintiff ,on the ground that the defendant did not unpack the container at its premises.

[11] As regards the quantum of plaintiff's damages, as I have pointed out above, this is no longer an issue between the parties.

[12] Counsel did not address me on the issue of the wasted costs occasioned by the adjournment of the matter on the previous

occasion. Such adjournment was occasioned by the need on the part of the plaintiff to produce the relevant lease agreement, referred to in paragraph [2.8] *supra*. Accordingly, it seems fair and equitable that the plaintiff should be liable for any wasted legal costs occasioned by that adjournment.

[13] I therefore grant judgment in favour of plaintiff against the defendant as follows:

A. Payment of the sum of US$21,601.25.

B. Interest on the sum of US$21,601.25 at the rate of 15.5% per annum, *a tempore morae* from the date of judgment to date of payment.

C. Costs of suit, save that plaintiff is ordered to pay defendants wasted legal costs, occasioned by the adjournment of the matter on 26 May 2008.

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SWAIN J.

Appearances: /

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For the Plaintiff	:	Mr. I. L. Topping
Instructed by	:	Shepstone & Wylie Durban
For the Defendant	:	Mr. S. M. Shepstone
Instructed by	:	Senekal Simmons Inc. C/o Du Toit Havemann and Lloyd Glenwood, Durban
Date of Hearing	:	26 May 2008 and 26 October 2009
Date of Filing of Judgment	:	30 October 2009