IN THE KWAZULU – NATAL HIGH COURT, DURBAN

REPUBLIC OF SOUTH AFRICA

(Exercising its admiralty jurisdiction)

A1155/2010

In the matter between:

Italspeed Automotive Ltd a Sao Paulo Brazil — Applicant

and

Geodis Wilson South Africa (Pty) Ltd — Respondent

Judgment

Lopes J

[1] The applicant in this matter is a company registered in Brazil where it carries on business as an importer of raw materials and equipment for the manufacture of cars, trucks and bus wheels.

[2] A company which is referred to only as ATS went into liquidation in 2007.

It was the owner of what is referred to in the papers as two heat treatment plants. Pursuant to the liquidation of ATS the two heat treatment plants were sold on auction in February 2010 to the applicant who was highest bidder for the first heat treatment plant, and as there were no bids for the second heat treatment plant, it was included by the liquidator at no additional cost to the applicant.

[3] The applicant then wished to have both heat treatment plants shipped to Brazil where it intended to use them.

[4] The respondent is a freight forwarder which carries on business in Gauteng. On the 27th May 2010 the applicant and the respondent concluded a written agreement in terms of which:

a) the respondent was to arrange for the shipment of the two heat treatment plants packed into containers from Babelegi, North West Province, South Africa to Sepetiba in Brazil; and

b) the applicant would pay $235 000 as a lump sum freight all in price; and

c) the respondent was to be paid for the shipment of all the equipment, per heat treatment plant, per shipment in full, prior to loading of the cargo on ships at the port of Durban.

[5] The applicant's representatives informed the respondent's representatives

that the two plants could not be shipped on board one ship due to the requirements of the import licence issued by the Brazilian customs department.

[6] In order to comply with its obligations, on the 8th June 2010 the respondent placed a booking order with Hamburg Süd South Africa for the carriage of the 19 containers comprising the first heat treatment plant, aboard the "*mv Alianca Maua*" which was scheduled to depart from Durban harbour on the 4th July 2010. The applicant paid to the respondent in full the freight for the carriage of the first heat treatment plant.

[7] It is common cause that three containers of the first heat treatment plant were not placed on board the "M*V Alianca Maua"*. They remained in Durban harbour. On its own evidence the respondent has been unable to establish why the three containers were short-shipped by Hamburg Süd. On the 6th July 2010 the respondent notified the applicant that the three containers had been short-shipped and expressed the view that those containers would have to be shipped along with the second heat treatment plant.

[8] The respondent then made arrangements with Hamburg Süd for the carriage of the three short-shipped containers on board the "*mv Monte Sarmiento*", scheduled to depart from Durban harbour on the 11th July, 2010, and which ship was to carry the second heat treatment plant.

[9] On the 9th July, 2010 the respondent, in an email, requested that the second treatment plant together with the three short-shipped containers not be shipped on board the "*mv Monte Sarmiento*" because that would not be in accordance with the import licence approval granted by the Brazilian customs department. The fact that three containers had been short-shipped from the first heat treatment plant meant that the applicant had to change the import licence for the second heat treatment plant, and that could only occur after the Brazilian customs department had granted the amended import licence approval.

[10] The consequence of breaching the import licence, according to the applicant, was that they would incur "*very high value fines*" which they alleged would be for the account of the respondent.

[11] On the basis of the instruction not to ship the second heat treatment plant 18 containers had to be transported out of the port and stored in independent third party warehouses. A liability then arose to Hamburg Süd for storage costs and demurrage charges on the containers into which the second heat treatment plant had been stuffed, as well as on the three short-shipped containers.

[12] Thereafter the applicant notified the respondent that the Brazilian customs department had stipulated that the three-short shipped containers could not be imported into Brazil on their own, and because of certain weight-related requirements, they would have to be shipped together with two containers from

the second heat treatment plant.

[13] The respondent's attitude was then that it would do so provided the applicant provided security in the sum of R122 700 being additional charges incurred in respect of the three containers (basically port storage fees, warehouse storage fees, additional trucking charges and container demurrage charges). Those charges were accruing on a daily basis. In addition the respondent purported to claim a lien over the three short-shipped containers in respect of the additional charges. The respondent also required that payment be made in full of the freight in respect of the second heat treatment plant.

[14] Viewing the respondent's conduct as "*adding insult to injury*" the applicant brought this application in terms of which it sought :-

a) an order directing the respondent to make all necessary arrangements to ship the three short-shipped containers together with two containers from the second heat treatment plant, alternatively to release those containers into the possession of the applicant. In this regard the applicant tendered a letter of guarantee from its attorney that he had in his trust account the sum of $14 000 (US$7 000 per container of the proposed two containers from the second heat treatment plant) and $20 000 in respect of the three short-shipped containers. In the alternative it undertook to pay such security as may be directed by this Court.

[15] The various contentions of the parties were ventilated in a full set of affidavits. In its replying affidavit, however, the applicant reiterated the urgency of the matter because the Brazilian customs department had given the applicant until the 14th November 2010 to obtain relief (but with an indication that there may be room to extend that period). The stance of the applicant had now changed in that it stated that the Brazilian customs department had indicated that it would allow the shipment of the three short-shipped containers separately from the two containers from the second heat treatment plant.

[16] In the light of what it viewed as the respondent's breach of contract in not shipping the entire first heat treatment plant, the applicant withdrew its tender of security in respect of both amounts. The applicant annexed to its replying affidavit an amended order prayed directing the respondents to ship, by no later than 25th November 2010, the three short-shipped containers, alternatively to release those containers immediately into the possession of the applicant. The applicant further sought an order declaring that it is not obliged to provide security to the respondent for the release of the containers, alternatively, that this Court should determine such amount and the form of any such guarantee to be provided. In addition it sought an order that in the event of the respondent failing to comply with any order made by the Court the applicant would be granted leave to apply for an order committing to prison the respondent's directors for contempt of Court.

[17] It was agreed between the parties that the disputes between them would ultimately be resolved in arbitration proceedings. They were agreed that the arbitration clause in the agreement which they concluded was defective inasmuch as there is no "*South African Economic and Trade Arbitration Commission*" which could resolve the dispute in arbitration. Accordingly it was agreed between counsel in argument that any reference to arbitration which I make in any order, would require that the identity of the arbitrator be determined by the chairman of the Society of Advocates of KwaZulu-Natal.

[18] Mr Harpur SC who appeared for the applicant submitted that before I could refer any dispute to arbitration it was necessary that there be a genuine and *bona fide* dispute between the parties. In this regard the onus was on the respondent to establish its entitlement to exercise a lien over the three short-shipped containers. He submitted that in view of the fact that the respondent had breached the agreement in circumstances where it was unable to justify that breach, it should bear all the consequences thereof. Those consequences necessarily included the cost of storage, demurrage, etc on the three short-shipped containers together with any additional cost of shipping those containers to Brazil.

[19] Mr Pammenter SC who appeared for the respondent pointed to the fact that the respondent had made arrangements for the subsequent shipment of the

three short shipped containers but had been instructed by the applicant on the 9th July 2010 not to do so. He identified the Brazilian customs department as being the cause of the fact that the respondent had been unable to comply with its obligations in terms of the agreement. He pointed to the efforts the respondent had made to resolve the problem and submitted that the respondent is only holding the applicant liable for storage, demurrage, etc because the respondent had been given conflicting sets of instructions by the applicant.

[20] Mr Pammenter SC made it clear that the respondent did not accept that the Brazilian customs department had made the stipulations conveyed to the respondent by the applicant. This was because no evidence had been produced at any stage in the form of a customs import permit or any other communication from the Brazilian customs department.

[21] Given the discretion vested in a Court in terms of sub-s 6(3) of the Admiralty Jurisdiction Regulation Act, 1983 ("the Act") to accept hearsay evidence in Admiralty proceedings together with the absolute lack of any suggestion that the instructions received by Mr Dickinson, the attorney for the applicant and deponent to the founding affidavit, had been anything other than what was contained therein, I accept, for the purpose of this hearing only, the truth of those allegations regarding the Brazilian customs department.

See : Cargo laden and lately laden on board the mv Thalassini Avgi v mv Dimitris 1989(3) SA 820 (A) @ 841C – 843D.

[22] Mr Pammenter SC submitted that the three short-shipped containers should be shipped by the respondent, alternatively released to the applicant, subject to the applicant putting up security for the full value of the respondent's claim. Provision could be made for that security to fall away if the respondent failed to institute the arbitration proceedings (by way of filing a statement of claim) within a specified period. He indicated that the three short-shipped containers could be shipped aboard the next Hamburg Süd vessel sailing from Durban to Sepetiba in Brazil after the provision of security.

[23] Because the storage, demurrage, etc charges increased on a daily basis, the security presently required by the respondent was R311 670,90, together with further storage charges per container per day of R94,85, together with demurrage charges per container per day of R460.

[24] In addition Mr Pammenter SC sought interest at 15,5% per annum for a period of six months within which the arbitration proceedings should be finalised.

[25] In reply Mr Harpur contended that one cannot view the rights of the applicant differently from the 9th July 2010 onwards as the respondent would have me do. This is because the respondent's breach of contract was the root of the problem and it bore an obligation to ensure that it complied with those contractual obligations.

[26] It seems clear that the respondent breached its obligations by not ensuring that the three short-shipped containers travelled together with the rest of the first heat treatment plant to Brazil. However, it is significant that the respondent immediately sought to remedy its breach of contract by arranging for the onward transmission of the three short-shipped containers. I do not accept that it was incumbent upon the respondent to have known and understood the changing requirements of the Brazilian customs department in circumstances where they were not communicating with that party. That was done by the applicant's representatives and conveyed to the respondent from time to time. Nor was it reasonably foreseeable in my view that the Brazilian customs department would change their minds and stipulate that two containers from the second heat treatment plant should be included with the three short-shipped containers.

[27] Pursuant to the instruction of the applicant not to ship the three short-shipped containers, it was inevitable that additional charges would be incurred in respect of all the remaining containers. Inevitably those charges would include port storage fees, warehouse storage fees, additional trucking charges and demurrage charges.

[28] It is not necessary for me in this application to decide who should ultimately be liable for those charges. That is a matter which would more properly be determined by an arbitrator, more particularly as both parties appear

keen to vent their complaints of one another's conduct in more detail.

[29] I am accordingly of the view that the respondent is entitled to exercise a lien over the three short-shipped containers and should be obliged to ship them to Brazil only upon the provision of security by the applicant for the additional charges incurred after the 9th July, 2010. The respondents claim for such security is a maritime claim as set out in sub-s 1(a) of the Act and I have a discretion to order security in terms of sub-s 5(2)(b) and/or (c) of the Act.

[30] In that regard the respondent has shown a *prima* facie need for such security, and as the applicant is a peregrinus with no residential presence in South Africa, on a balance of probabilities that need for security is both genuine and reasonable.

[31] With regard to the question of costs, this is really not a matter which should ever have ended up before me. With a little reasonableness on the part of both parties, the matter could, and should, easily have been resolved. *Prima facie*, the applicant should have realised that it was its own changing instructions that resulted in the additional costs being incurred, but there seems no real reason why the respondent should not have accepted the security initially proffered by the applicant.

[32] In all the circumstances I am of the view that it would be equitable were

each party to bear its own costs in relation to this application.

[33] With regard to the provision of security I am of the view that the usual practice of requiring that security be provided to the satisfaction of the Registrar of this Court be followed.

[34] In all the circumstances I grant the following order :-

1(a) Against the provision of the security referred to in paragraph 2 the respondent is directed to make all necessary arrangements forthwith to ship the three containers bearing the numbers SUDU5664378, SUDU5989970 and SUDU6813049 from the port of Durban to the port of Sepetiba, Brazil;

(b) those goods are to be shipped aboard the first available Hamburg Süd vessel sailing from Durban harbour to Sepetiba after the provision of the security referred to below;

(c) in the event of the respondent failing to institute arbitration proceedings against the applicant for the payment of the amount forming the subject matter of its claim by way of the filing of a statement of claim within 30 days of the date of this judgment, any security provided by the applicant in respect of this order shall fall away and any documentary form of security provided shall be returned to the applicant by the respondent ;

(d) any arbitration proceedings instituted in accordance with paragraph 1 above shall be before an arbitrator nominated for that purpose by the

chairman for the time being of the Society of Advocates of KwaZulu-Natal;

2. The applicant is directed to provide to the respondent the security envisaged in paragraph 1 above in the sum of R311 670,90 together with further storage charges calculated from the 23rd November, 2010 per container per day of R94,85 and demurrage charges per container per day of R460, and a provision for interest thereon calculated at the rate of 15.5% per annum for six months, such security to be in such form as may be directed by the Registrar of this Court.

3. Each party is to pay their own costs of this application.

Date of hearing : 23rd November 2010

Date of judgment : 2nd December 2010

Counsel for the Applicant : G D Harpur SC (instructed by D J Dickinson & Associates)

Counsel for the Respondent : C J Pammenter SC (instructed by Fullard Mayer Morrison Attorneys)