

IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION: DURBAN

(In the exercise of its Admiralty Jurisdiction)

CASE NO: A66/2014

In the matter between:

Mycsa Mulder Y Co Import Export SA

Applicant

and

Transnet SOC Ltd

Defendant

Judgment

Lopes J

[1] On the 27th August 2014, an action-in-*personam* was instituted by Mycsa Mulder Y Co Import Export SA ('Mycsa'), a company incorporated in accordance with the laws of Spain, against Transnet SOC Ltd which trades as Transnet Port Terminals ('Transnet'). Mycsa's claim is in delict, for cargo allegedly lost whilst in the care of Transnet.

[2] Mycsa alleges: -

- (a) On the 2nd of May 2012, 30 pieces of cargo, constituting a Sennebogen 5500 Star-lifter crane ('the crane'), was offloaded from the MV 'Red Cedar' ('the ship') into the care and custody of Transnet at the Point Multipurpose Terminal in Durban Harbour, and stored in what was referred to as the 'staging area' in the terminal.

- (b) The crane had been dismantled prior to loading and was loaded on board in Leixões, Portugal.
- (c) On the 27th September 2012, the area where the crane was stored was declared a 'Virtual State Warehouse' by the Department of Customs ('Customs'), in terms of the Customs and Excise Act, 1964 ('the Act'). This occurs when break-bulk cargo has not been cleared through customs within 28 days from the date of landing. It is normally then removed to the State Warehouse. The Controller of customs is permitted, in terms of s 43 of the Act, to allow the cargo to remain where it is, but declare the area where it is a Virtual State Warehouse, and the cargo is then deemed to be under the control and direction of the Controller of customs.
- (d) The cargo was only ultimately cleared and removed from the staging area on the 30th September 2013, and then it was transported to Beira in Mozambique, by road. The arrangements for the payment of customs dues, the removal of the cargo from the staging area and its transportation to Beira were carried out by Exposure Management Services (Pty) Ltd, trading as Interlogix.
- (e) Interlogix was reimbursed by Grinrod Ships Agency (Pty) Ltd trading as King & Sons, the clearing and forwarding agents in Durban. King & Sons, in turn, were reimbursed by Mycsa.
- (f) When the dismantled parts of the crane arrived in Beira, it was discovered that:
 - (i) A base plate counterweight or bracket ('the base plate') with a mass of 13.3mt, and ten counterweights, each weighing 4.8mt were not delivered;
 - (ii) Ten items, comprising what turned out to be some type of flooring cover, which did not belong to Mycsa, were

delivered in error to Beira. They were, in short order, returned to Durban by King & Sons.

- (iii) A quantity of electrical equipment was removed or stripped from the crane, and it is common cause that that electrical equipment never arrived in Beira.
- (iv) Various defences were raised by Transnet including a special plea of prescription. Mr *CJ Pammenter SC*, who appeared with Mr *AJ Boulle* for Transnet, recorded that the special plea would not be pursued, save insofar as it may be indicative of the period for how long any duty of care which may have been owed by Transnet to Mycsa, existed.
- (v) At the outset of the trial Mr *PJ Wallis SC*, who appeared for Mycsa requested an amendment to the particulars of claim, to reduce the amount claimed in respect of the ten missing counterweights and damage suffered by the loss of electrical equipment to €126 820, 47. In addition, Mycsa claimed the sum of R1 194 722 in respect of the base plate.

[3] The issues before me were accordingly: -

- (a) Whether the missing base plate and the other ten counterweights were ever loaded aboard the ship.
- (b) Whether those items were ever discharged at Durban.
- (c) Whether they were ever loaded on the trucks to be transported to Beira.
- (d) Whether Transnet owed a duty to Mycsa in respect of the missing items, if so, for how long;

[4] The matter of quantum was eventually agreed by the parties to be;

- (a) €36 118,35 in respect of the base plate, and
- (b) €72 066,50 in respect of the ten counterweights.

No agreement was concluded as to the value of the lost electrical components.

[5] The first witness for Mycsa was Mr Olaf Mulder. The important aspects of his evidence were:

- (a) Mycsa was formerly part of a much larger company, which was demerged into four separate companies. Mycsa kept the business involving the importation, distribution and servicing of cranes for various European manufacturers, such as Sennebogen;
- (b) The crane was described as a 'crawler crane' with a lifting capacity of 180mt;
- (c) The lost items from the crane were the base plate and the ten other counterweights which are mounted onto, and are affixed to, the rear of the crane when it is working;
- (d) The base plate runs the entire width of the crane and the ten counterweights, five on each side, sit on top of the base plate;
- (e) During or about March 2012, Mycsa, the owner of the crane, concluded an instalment sale agreement with Grúas Usabiaga ('Usabiaga'), a crane hire company operating in Northern Spain;
- (f) The price was to be paid by Usabiaga by forty-eight monthly instalments of €13 570,00, together with a final payment of €738 303,42;
- (g) The sale of the crane was registered in Spain, with the object of protecting Mycsa. However, Mycsa agreed to the issue by the Spanish authorities of a permit to Usabiaga, to enable it to remove the crane from Spain to South Africa;

- (h) None of the instalments were ever paid by Usabiaga, and the crane was never returned to Mycsa;
- (i) Usabiaga was to have hired the crane out to an entity in Durban, CraneCom. This deal, for one or other reason fell through, and the crane was never cleared and uplifted by CraneCom in Durban;
- (j) Eventually Mycsa cancelled the instalment sale agreement in July 2013. By that stage, the crane had been carried aboard the ship from Leixões to Durban, under a MACS bill of lading;
- (k) The crane was dismantled prior to shipment in Leixões and the bill of lading records that there were '30 pieces';
- (l) There were clearly problems during the loading, because parts of the crane were, at some stage, removed from the harbour area of Leixões and then returned to it. There was also some paintwork damage caused to the lattice boom sections because a forklift was used to load the crane;
- (m) A report was compiled by Usabiaga regarding the loading of the crane which was eventually forwarded to Mycsa. It formed part of the record before me. The personnel of Usabiaga in Leixões were asked to leave the port area, apparently because of protests which they lodged because of the manner in which the crane was being handled. In the report are two photographs of items being lifted aboard the ship. Mr Mulder testified that, from the photographs:
 - (i) he could clearly see the base plate and some of the counterweights being suspended below a gantry which was used in the reloading of some of the parts which had been removed. The gantry is suspended immediately above the deck of the ship. What Mr Mudler in fact said, was;

‘I am sure that it is like stapled goods. The narrow one, is one of the base counterweights. It is either base counterweights or one of the chassis counterweights of the machine. They are very similar in aspects. Then there is three, apparently three, of the 10.48mt counterweights on top.’

- (ii) Mr Mulder could see that, on top of the weights in the sling, was a pulley block with a hook (‘hook-block’) which is used to do the lifting by the crane;
- (n) He later said that he was certain that it was the base plate, weighing 13.3mt. He was able to say this because of the thickness evidenced by the item in the photograph;
- (o) As part of the court record there was a number of photographs of the crane, apparently taken after they had arrived in Beira. Evident in the photograph is a large boxed-shaped number of the floor coverings which did not form any part of the crane. Other parts of the crane were identified by Mr Mulder, but the base plate and the counterweights were nowhere to be seen. Mr Mulder expressed the view that it was impossible to be mistaken about the floor coverings not being part of the crane, because they were made of rubber and would have no effect as a counterweight, which is made of cast-iron. Mr Mulder was unable to identify the hook-blocks (two of them) which were depicted in the photographs. The first one was the wrong colour for Sennebogen equipment, and the other was clearly marked ‘Liebherr’. He testified that they would not normally have used the equipment of another manufacturer with the crane, apparently because of the risks in Europe of being prosecuted for doing so;
- (p) Mycsa paid a total of \$260 000 for clearing the crane from the harbour and transporting it to Beira;

- (q) Mr Mulder testified that when the crane arrived in Beira, the base plate was missing as well as the 10.48mt counterweights. In addition, the electrical installation had been, as he described it, 'plundered and vandalised and partly robbed'. The electrical equipment included a load limiting device, certain sensors and a wind measurement device which were all missing. It then transpired that it was not Mr Mulder who saw the crane in its original condition when delivered to Beira, but a certain Mr Fernka, a director of Mycas who is no longer employed by the company;
- (r) Mr Mulder referred to a SAD500 customs declaration form, compiled and signed in Durban, and dated the 25th September 2013. The block numbered 31 on that document refers to 'BREAKBULK CARGO STC29 PKGS CRAWLER CRANE IN CKD FORM'. STC is an acronym for 'said to contain' and CKD is 'completely knocked down'. The document is signed by one Kershni Bharat, a customs broker employed by Interlogix. A further SAD500-custom declaration form dated the 27th September 2013 referred to 'BREAKBULK CARGO STC 1 CASE' described as being 'BRACKET FOR MACHINE 5500.5.170 Product; PARTS FOR CRANE';
- (s) The gross mass of the bracket referred to in that declaration form was 13 300kgs; it would appear that the only item weighing 13 300kg was in fact the base plate;
- (t) Mr Mulder was of the view that the only possible guess he could make as to the identity of the item was that it was a base plate;
- (u) Mr Mulder was emphatic that that base plate was not the original one which was part of the crane. This was a replacement. The market price of that bracket was R 1 194 772.

[6] Under cross-examination, Mr Mulder conceded that he was unable to say whether the procedure depicted in the photographs was the loading of the crane onboard the ship, or the offloading of it for the purpose of relocating it outside the port boundaries. What was referred to in the report was the fact that the crane was 'eventually fully loaded at 17H00'. Mr *Pammenter* suggested to Mr Mulder that the report clearly contained a concern by Usabiaga that not everything was loaded. This was because the report stated:

'Gruas Usabiaga is therefore not responsible for the damage, wear or loss of items belonging to each of the crane components.'

This statement is made after setting out the complaints of Usabiaga regarding the exclusion of their personnel from the harbour precinct, and that the trucks containing the crane had to be parked outside the harbour precinct in a public parking area overnight. Allegations of incompetence, unhelpfulness and general complaints of 'total chaos and lack of prevision and organisation, as already loaded parts must be hoisted again for relocation' during the loading process are made.

[7] Mr Mulder also conceded that the wrong 'hook-pulleys' had been delivered. Mycsa was not, however, claiming for those parts. He considered it unlikely that those items were shipped by Usabiaga. He was also unable to articulate precisely which of the missing electrical items were missing, and which were broken. He said that the parts were elements of the anemometer, which measures the strength of the wind. Mr Mulder suggested that once Transnet were notified that the crane was damaged and parts were missing, they should have sent someone to assess the damage. Transnet simply never replied to the notifications sent to them by King & Sons.

[8] Mr Mulder said that Mycsa sent invoices to King & Sons, who, presumably, sent them on to Transnet. Some of the invoices referred to were not claimed in this action. He also conceded that the damage to the electrical components was something he was told about, and not something he physically witnessed.

[9] The second witness for Mycsa was Mr Kevin Pillay, who, during 2013/2014 worked as the logistics representative, and later the logistics supervisor of King & Sons. King & Sons were the ship's agent for MACS. His functions were to see that the ship was brought into the harbour; to manage the discharge of cargo; see to all the needs of the ship; and ensure that it leaves the harbour. After the ship docks, the agent receives a ship's manifest from the loading port. The manifest would be produced to customs to facilitate the discharge of the cargo. MACS appointed their own tally company, MACS TALLY. The function of the tally company was to oversee the discharge of the cargo.

[10] During the discharge, Transnet would have had its own staff on the quayside. Their function was to compile a cargo outturn report. At the stage the cargo was removed from the ship, it was not cleared by Transnet or Customs. The Transnet report in this matter recorded the offloading of 30 unmarked pieces with a mass of 203 020kgs. The cargo was also inspected by the staff of MACS TALLY.

[11] Interlogix were appointed by Mr Pillay to convey the cargo to Beira. He described Interlogix as a cargo management company that specialised in cross-border cargo deliveries. He did not know of, and was not ever informed, that some

cargo had not been offloaded from the ship. This was confirmed by the contents of the outturn report.

[12] Mr Pillay ensured that the cargo was collected from the staging area, and transported by road to Beira. Transnet invoiced Interlogix for the storage and release of the cargo, and Interlogix paid the value of the invoice, and was, in turn, reimbursed by King & Sons, who were paid by Mycsa.

[13] On the 19th September 2013, a 'Non Conformance Report' was sent by King & Sons to Transnet, recording that, when the cargo was being tallied in preparation for the upliftment thereof for transportation to Beira, the base plate with a mass of 13 300kgs was missing from the items reflected on the bill of lading. This was addressed to George Aucamp and Graham Henry of Transnet, by the claim adjustor for King & Sons, Solethu Mboyiyana. Mr Pillay was copied in on this correspondence, and remembered it. He thought that the missing base plate was noticed by the staff of MACS TALLY. Mr Pillay was responsible for organising the return of the mis-delivered flooring material from Beira back to Durban.

[14] Under cross-examination, Mr Pillay conceded that he had no personal knowledge of:

- (a) what happened to the missing parts;
- (b) what was loaded at Leixões;
- (c) what was offloaded in Durban; and
- (d) what cargo went onto the trucks to be carried to Beira, although he had been responsible for arranging their transportation.

[15] Mr Pillay also conceded that he was present at the loading of the trucks, but could not say whether the cargo offloaded included the flooring material. He accepted that the tally clerks had counted 30 pieces when the cargo was offloaded, that they did not weigh them, and some 16 months' later, 30 pieces were identified at the staging area as belonging to the crane.

[16] In re-examination, Mr Pillay pointed out that the reference in the Arrival Notification to:

‘1 CASES

1 CASE (S)

Sennebogen crane 5500 R-SL serial number 5500.5.170’

demonstrated that two cases were delivered – this was, in fact, a glitch in the computer system, and the line starting ‘1 CASE (S)’ was actually a heading which should have appeared at the top of the column. This led, in turn, to an incorrect count of 31 pieces, when there were actually only 30 pieces.

[17] Transnet led one witness, Mr Graham Shawn Henry, who testified that he had been employed by Transnet for 23 years, and in 2012 was the Operations Manager at the Point area, responsible for the staging area. His functions included ensuring: that the terminal was profitable; the safety of his employees; and the offloading and despatch of cargo. His evidence was, in summary:

- (a) he recalled the arrival of the ship, and the fact that there were no other cranes in the staging area at the time;
- (b) where cargo is not cleared within 28 days after arrival, Customs is notified. The cargo is then either removed to the State Warehouse, or a Virtual State Warehouse is declared. The cargo then falls under

the ownership of Customs, who advises Transnet whether the cargo will be sold by auction;

- (c) in order for goods to be uplifted by the owner after a Virtual State Warehouse has been declared, a Release Notification and a rent note must be obtained from Customs;
- (d) when cargo is discharged, the Transnet representative checks the cargo against the ship's manifest and confirms that the cargo has been landed. If cargo is short-landed, a discrepancy report is compiled, which is essentially the outturn report. If a piece of cargo is not located, the clerk will issue a supplementary report;
- (e) the outturn report in this matter confirms that 30 unmarked 'pkgs' (packages) were offloaded from the ship. The virtual warehouse declaration also confirms 30 packages were 'taken up into the records of the State Warehouse' on the 27th September 2012. The cargo was to remain under the care ('footprint') of Transnet, awaiting further instructions from Customs, or an application by the client;
- (f) a Transnet landing order, date-stamped the 26th September 2013 records the arrival of 'BREAKBULK CARGO STC 29 CASES SENNEBOGEN CRANE 5500. . . DETAILS AS PER PACKING LIST'. The document is signed at the bottom left-hand corner by what is shown as an 'authorised agent', which Mr Henry said 'could be' the ship's agent or clearing agent;

(This document has a line drawn through it from the top right-hand side to the bottom left-hand side!).

- (g) the Non Conformance Report would have come to his attention, but he could not recall it. He accepted that the Non Conformance Report placed Transnet on warning that 30 packages came off the ship, and one was now missing – the 13.3mt base plate. The 29 packages were also recorded in a SAD500-CUSTOMS DECLARATION FORM, unstamped, but dated the 25th September 2013. This was from the same author (Kershnie Bharath of Interlogix) as a similar form dated two days' later, recording one case containing a bracket with a mass of 13 300kgs. As the cargo was not clearly marked, a representative of Interlogix placed onto each package an A4 size piece of paper identifying the package by 'Colli No'.
- (h) Mr Henry was referred to the Usabiaga report prepared on shipment, where item no 9 referred to the base plate with a mass of 13 300kgs;
- (i) when the packages were loaded onto the trucks for transportation to Beira, delivery notes (followed by documents containing the truck driver's identity photograph) were prepared and signed by Transnet to indicate its correctness. He agreed that it was common cause that no delivery note referred to the base plate, so it never went to Beira. He had looked for it because of the Non Conformance Report, which had arrived three days' after the cargo left Durban. Mr Henry said that a sweep of the staging area would have been done to look for it. He could not say whether Customs had sold it.
- (j) Mr Henry maintained that 10 bundles of counterweights (shown in a photograph with the description of 'Colli No 10-19') with a mass of 4 800kgs each, were what was loaded onto the trucks. He said that they were not the counterweights for the crane. He stated that they were confirmed by 'the clients representative' and labelled, and

would not have been loaded onto the trucks unless otherwise. The manifest was not specific as to the identity of the pieces of cargo which were described as cases, although there were no cases at all.

- (k) Mr Henry confirmed a tax invoice addressed by Transnet to Interlogix in respect of landing, late order and storage charges for 28 days', which reflected the cargo.

[18] Under cross-examination of Mr Henry by Mr *Wallis*, the following emerged:

- (a) When cargo is offloaded, the Transnet cargo controller tallies the cargo without a manifest. The cargo controller is close to the cargo, and the count is done side-by-side with the person conducting a count for the ship, and would be checked against that count. As the cargo controllers do not use the ship's manifest, they may not be aware of any short-landing.
- (b) Transnet does not have an internal process to check on cargo which should have been offloaded, but was not. The outturn report could be checked against an inventory report and against the manifest. The Transnet inventory clerk would cross-check physically landed cargo against the manifest. The inventory clerks are experienced, they walk the terminal regularly, and ad-hoc stock-takes are done, albeit irregularly.
- (c) When asked by Mr *Wallis* how an item weighing 13 300kgs could disappear from the staging area, Mr Henry said that question tells him that the base plate was never loaded (at Leixões) – he also suggested that Colli No 9 (as depicted in the photographs) was the crane jib, and not the base plate. He was then referred to the State

Warehouse Deposit Note, which he confirmed was completed by the manifest clerk. When pressed on the fact that the document reflected 30 packages, Mr Henry conceded that the details probably came from the manifest, and that it was also probable that the inventory clerk did a floor sweep and compared his count with the manifest.

- (d) Mr Henry stated that, on the appointment of the Virtual State Warehouse, Customs would have worked only with the documents. In addition, if any cargo had been removed by Customs, they would all have been told.
- (e) The staging area has security cameras, but Mr Henry was unsure whether they were operative. He was not aware of anything having been stolen from the staging area. When cargo was to be removed from the staging area and is not labelled, it is necessary for the shipping line to label it, and identify the items against the bill of lading. In this case, King & Sons sent a clerk who marked the cargo 'Colli for Colli'. When the transporter arrives, a load co-ordinator will instruct Transnet as to which items are to be loaded onto which trucks. When the trucks exit the precinct of the harbour, security personnel verify the cargo on the delivery notes with the cargo on the truck.
- (f) Mr Henry said that the Interlogix clerk relabelled the rubber mats or floor coverings as belonging to the bill of lading, and Transnet relied on his identification. He also suggested that any discrepancy between documents identifying 30 or 29 pieces of cargo may be attributable to the fact that one of the crane jibs could fit into another (telescope effect) and two items may have been counted as one.

[19] Mr *Wallis* submitted that it is probable that the base plate was loaded on the ship, and discharged at Durban into the care of Transnet because:

- (a) The control systems exercised by the various parties indicated that the cargo was all landed, although the condition of the cargo was not set out.
- (b) The survey report compiled at Leixões by an independent party before any dispute arose, indicates that the base plate was loaded onto the ship.
- (c) This is confirmed by the colour photographs as interpreted by Mr Mulder, who was certain as to the identity of the base plate. This he could do because of the counterweights with the chevron marks lying on top of the base plate, and the relative dimensions of the items depicted – the length, width and thickness of the base plate.
- (d) No Notice of Protest, or any other document recording a problem was received by Mycsa.
- (e) Mr Pillay stated that he would have been aware if cargo had not been discharged.
- (f) King & Sons, who were the agents for MACS would have realised, at the ship's next port of call (Richards Bay), if any cargo had been left on board.
- (g) The best description of what was loaded aboard the ship is contained in the Usabiaga report, which report included both the base plate and the ten missing counterweights.

[20] The reason that the crane was kept there for some sixteen and a half months was that the instalment sale purchaser, Usabiaga, purported to hire it out to CraneCom, but for some reason, that deal fell through. Usabiaga left the crane at the staging area, waiting for it to be uplifted. Eventually, Mycsa cancelled the contract with Usabiaga, and reclaimed its property from Transnet. The declaration of a Virtual State Warehouse only happened between four and a half and five months after the arrival of the crane.

[21] Mr *Wallis* submitted that the size and weight of the missing base plate and the ten counterweights ‘guaranteed’ that it could not and would not be removed by unauthorised persons from the staging area. No evidence was led to demonstrate that the missing items were sold on auction by Customs, and if that had happened, Transnet would have known. Transnet has failed to produce any documentation from the State Warehouse, no regular stock-takes were conducted, and there are no records of the *ad hoc* stock-takes that were conducted. The only control mechanism used by Transnet was to have the cargo labelled in 2013, when the cargo was to be transported to Beira. This was done because Transnet had no idea of the identity of the person to whom the cargo belonged.

[22] With regard to any duty of care which Transnet bore, Mr *Wallis* submitted:

- (a) Transnet were in charge of the care of the goods, and they charged for that storage.
- (b) Accordingly, Transnet had a duty of care to act reasonably with regard to the storage of, and care for, the cargo.
- (c) Transnet cannot have it both ways: it charged for the storage of 189mt, but did not charge for the base plate because they had already received a note of protest.

- (d) Mycsa did not know where the cargo was located, and only established and located it five months after discharge.
- (e) In terms of the statutory conditions imposed by Customs in the declaration of a Virtual State Warehouse, Transnet was:
 - (i) responsible for the cargo until further notice from the Controller of Customs;
 - (ii) liable for any duty on the cargo for the period of its storage;
 - (iii) entitled to payment of State Warehouse rent as prescribed;
 - (iv) the cargo could only be released against an authenticated DA 68, signed on behalf of the Controller;
 - (v) the liability of SARS was excluded.
- (f) There is no statutory exemption for Transnet, and the base plate, the counterweights, and the electrical items may have been removed prior to the declaration of a Virtual Customs Warehouse. There was no abandonment of the cargo, and no evidence from Transnet as to what happened to the missing cargo.

[23] Mr *Wallis* recorded that the quantum had been agreed as set out above. No agreement had been concluded for the value of the electrical items. The electrical items had been repaired and paid for by Mycsa.

[24] Mr *Pammenter* submitted that Transnet owed no legal duty of care to Mycsa with regard to the cargo for the following reasons:

- (a) the mere fact that Transnet was in possession of the cargo, does not create a legal duty. He relied on the judgment in *Viv's Tippers (EDMS) BPK v Pha Phama Staff Services (EDMS) BPK h/a Pha Phama Security* 2010 (4) SA 455 (SCA) para 6, where Lewis JA held:

‘There is a spectre of limitless liability. It is established thus, that a court, in deciding to impose liability on an actor, must consider whether it is legally and socially desirable to do so, having regard to all relevant policy considerations, including whether the loss is finite and whether the number of potential plaintiffs is limited.’

In that matter, a security guard allowed the unlawful removal of a third-party owner’s truck from a site where the security provider had concluded a contract excluding liability for the provider’s services. The security provider was held not to be liable for the loss of the truck because it owed no duty of care to the owner to prevent the theft of the truck. The very contract in terms of which the security services were agreed, excluded liability to the third party. The court also expressed concern for the fact that: security services are often provided for premises where many third-party owners had assets, resulting in the possibility of limitless actions: which could result in an inability to obtain those services.

- (b) Mycsa was obliged to have pleaded the facts and circumstances giving rise to the legal duty of Transnet, and its negligent breach thereof. In this regard, Mr *Pammenter* submitted that an omission to act is not *prima facie* unlawful, and referred to *Stedall and Another*

v Aspeling and Another 2018 (2) SA 75 (SCA), paras 15-17, where the court stated:

‘[15] Moving to a different issue, in contrast to a positive act which causes physical harm to a person or property, a negligent omission, as relied on by the respondents, is not necessarily regarded as prima facie wrongful. Consequently in *Van Duivenboden*, Nugent JA stressed that a negligent omission should only be regarded as being wrongful “if it occurs in circumstances that the law regards as sufficient to give rise to a legal duty to avoid negligently causing harm”. (footnote omitted).

[16] The use of the phrase ‘legal duty’ in these circumstances means no more than that the omission must not be wrongful as judicially determined in the manner referred to above ie involving criteria of public and legal policy consistent with constitutional norms – see *Hawekwa Youth Camp and Another v Byrne* 2010 (6) SA 83 (SCA) . . . para 22. Importantly, the concept is not to be confused with the English law concept of ‘a duty of care’ which encompasses both wrongfulness and negligence.

...

[17] There is another matter relevant to the dispute before this court. As an omission is not prima facie unlawful the respondents, on particularising their claim, should not only have alleged that the negligent omissions upon which they relied had been wrongful, but pleaded the facts upon which reliance was placed in support of that contention. Indeed in *Kadir* this court stated that the facts pleaded “in support of the alleged legal duty represent the high-water mark of the factual basis on which the court will be required to decide the question”.’

- (c) An important aspect of any duty of care which may have existed, is the time period for which it should endure. The staging area in the port is part of a multipurpose area where break-bulk cargo is ‘dealt

with'. It cannot be expected of Transnet to keep the goods there indefinitely.

- (d) Section 43(2)(c) of the Act provides for the obligations of the Commissioner with regard to compiling and publishing a weekly list of goods stored in a State Warehouse, such publication being deemed to be sufficient notification to any party with a right to such goods that unless the goods be duly entered in accordance with the Act, they will be disposed of in terms of that section.
- (e) Section 17 of the Act provides for an exemption in the following terms:
 - '(3) The State or any officer shall in no case be liable in respect of any loss or diminution of or damage to any goods in a State warehouse or in respect of any loss or damage sustained by wrong delivery of such goods'

This exemption was not provided simply because Transnet would otherwise be liable.

- (f) The question to be answered is whether public policy considerations dictate that the legal duty of a person in charge of a Virtual State Warehouse should be extended in circumstances where it is statutorily obliged to care for cargo. Such a person has no choice! Had the goods been moved to an actual warehouse, Transnet would have had no duty of care to anyone. Following the above cases, a person in possession does not necessarily attract a duty of care – and Mycsa has not pleaded the basis upon which the duty of care arose.

[25] Mr *Pammenter* then dealt with the facts concerning the breach of any duty of care which Transnet may have borne. He submitted that;

- (a) there was no evidence to establish that the base plate was ever discharged. The bill of lading reflected 30 pieces, and so did the manifest. However, the tally clerks would have had little idea of what they were actually counting. Mr Henry testified that the manifest clerk is given the report of the tally clerk, and checks it against the manifest, but there is nothing to show what that was;
- (b) There is also the possibility that the two telescoped parts of the boom were counted as two pieces, and not one. The count may then have reflected 30 pieces when the base plate was not there. There was no evidence of anyone who saw the base plate since the ship was offloaded. It was only on the 19th September 2013 that it was realised that the base plate was missing. Mr Mulder testified that the base plate was not one of the 30 pieces of cargo reflected in the photographs taken in the staging area;
- (c) The probabilities favour that fact that the floor coverings were counted as ten items instead of the ten 4.8mt counterweights. If ten items were counted and removed, where is the negligence?

[26] Mr *Pammenter* submitted that, with regard to the electrical items, Mr Mulder was unable to specify where or how they were damaged or removed. There is no link disclosed in Mycsa's cause of action between the invoices raised and the damage caused. With regard to the quantum of Mycsa's claim, it was agreed that if Transnet is liable, the base plate was valued at €36 118,35, and the ten counterweights at €72 066,50. No valuation was agreed for the electrical items, and there is no evidence as to what was contained in the 3 x 20' containers.

[27] The first issue to be decided is whether Transnet, as the physical possessor of the cargo, owed any duty to the owner, Mycsa, with regard to the keeping and protection of the cargo. The parties were bound by contract, and Mycsa's claim was entirely based in delict. It was common cause that:

- (a) ownership of the cargo vested in Mycsa;
- (b) the cargo was delivered to Transnet. For the purpose of the reasoning on this issue, I shall assume that all the cargo was delivered;
- (c) In September 2013, it was established that the base plate, the ten counterweights and some electrical items were missing;
- (d) Mycsa pleaded that:
 - (i) Transnet was under a contractual duty to safeguard the cargo, and ensure that it was not removed by unauthorised persons. (Mr *Wallis* conceded that the contract was not concluded between Mycsa and Transnet, but between Transnet and the consignee of the cargo, and that Mycsa's claim lay only in delict);
 - (ii) Transnet bore a legal duty to Mycsa;
 - (iii) Transnet failed to deliver the missing items;
 - (iv) arising from the breach of the legal duty owed by Transnet, Mycsa suffered damages of €450 207,29 (amended to €126 820,47) in respect of 'the missing counterweights and other damage.

[28] In deciding whether a legal duty is owed for an omission, I am enjoined to consider whether public policy considerations and the legal convictions of society

would require Transnet to bear the liability for the loss of the base plate, the counterweights and the electrical items. I accept that Mycsa was a third party to the contract, and that the crane was effectively abandoned by the consignee, CraneCom. It is apparent from the evidence of Mr Mulder that the instalment sale purchaser of the crane, Usabiaga, hired the crane out, but failed in its obligations to pay for the crane. The deal between Usabiaga and CraneCom then fell through, and, it would appear, that neither of those entities took any further interest in the crane. It was only upon cancellation of the instalment sale agreement that Mycsa sought to recover the crane.

[29] It is perhaps important to note that any findings which I make will be on a preponderance of probabilities – that may be trite, but it means no more than ‘is it more likely than not the base plate and counterweights were loaded in Leixões?’ In *Coetzer v Krause* 1942 OPD 122, de Beer J stated;

‘To my mind the word *preponderance* merely implies a quantitative or qualitative superiority and does not suggest any substantial or marked superiority.’

[30] Should Transnet, in those circumstances, attract obligations to the owner of the crane, with whom it has had no relationship whatsoever? Two relevant considerations mentioned in *Viv’s Tippers* are that the owner, as a third party, does not benefit more than the original contracting party would, and whether the possibility of multiple plaintiffs exists? The limitation of liability contained in Transnet’s standard trading terms and conditions (annexed to the plea of Transnet, but not argued before me), would not be exceeded in this matter, but could have been, if more of the crane disappeared.

[31] In my view, and relying upon the authority of *Viv's Tippers* and *Stedall*, public policy considerations and the legal convictions of society would not require Transnet to bear liability for the losses of Mycsa in this matter. In *Peri-Urban Areas Health Board v Munarin* 1965 (3) SA 367 (A), the facts of which are entirely distinguishable from the present case, Harms JA, explained the circumstances in which a legal duty arises. He said –

‘Negligence is the breach of a duty of care. In general, the law allows me to mind my own business. Thus if I happened to see someone else’s child about to drown in a pool, ordinarily I do not owe a legal duty to anyone to try to save it. But sometimes the law requires me to be my brother’s keeper. This happens, for example, when the circumstances are such that I owe him a duty of care; and I am negligent if I breach it. I owe him such a duty if a diligens paterfamilias, that notional epitome of reasonable prudence, in the position in which I am in, would –

- (a) foresee the possibility of harm occurring to him; and
- (b) take steps to guard against its occurrence.’

Transnet’s obligations were fully contained in its contractual relationship with the shippers/consignees. From Transnet’s point of view, it was simply happenstance that the cargo lay where it did for some sixteen months’ before being recovered by Mycsa. Transnet played no role whatsoever in the contractual arrangements between the various parties. Then there is the notional (but seemingly most improbable) possibility of either the shipper or the consignee stepping forward to claim from Transnet.

[32] It is true that Mycsa paid Transnet for the release of the cargo, and storage, apparently, only for 28 days. This is what was suggested in the cross-examination of Mr Mulder, and not contradicted. In addition, Mycsa did not plead the facts and circumstances upon which the claim is based that Transnet bore a duty to Mycsa. The pleadings, in fact, do not specify the identity of the party to whom

the duty of care was owed. Although the allegation is made by Mycsa in its particulars of claim that the damages it suffered arose directly from the legal duty owed by Transnet, neither negligence nor wrongfulness are alleged.

[33] The statutory duties imposed on Transnet are based upon the provisions of the Act. This was pursuant to a relationship between Transnet and Customs, to which Mycsa formed no part. The liabilities created are not expressed to be applicable to third parties – see: s 43(2)(b) of the Act.

[34] Even were I to be persuaded that Transnet owed a duty to Mycsa, I remain unpersuaded that negligence on the part of Transnet has been established. In this regard:

- (a) In view of the problems created in the port of Leixões, and the removal of the crane from, and its return to, the harbour, a doubt is created whether the missing parts were simply never returned to the harbour. This is particularly so because the crane appears to have spent the night in a public parking area.
- (b) No real assistance is derived from the identification, from the Usabiaga report photographs, by Mr Mulder of the crane parts being loaded. This is because there was no verification from the taker of the photographs as to when exactly they were taken. I emphasize that this is no reflection on Mr Mulder, who I considered to be an honest and forthright witness. The photographs appear to have been taken from outside the port precincts.
- (c) In addition, Mr Mulder alluded to the fact that there were, in fact, three types of counterweights: the base plate, the ten counterweights, and two more chassis counterweights;

- (d) Mr Mulder also stated that the ten counterweights had yellow and grey chevron stripes. The photographs showed that the items he identified as some of the counterweights being loaded had red and white chevron stripes;
- (e) The collection of photographs taken of the dismantled crane (apparently taken in Beira) depicts 'Colli No 9 = 13.300 KGS'. Mr Mulder stated that what was actually depicted in the photograph was the 'wing' of the crane that separates the cables from the structure of the crane. The report from Usabiaga described Colli No 9 as a 'Counterweight baseplate' with a mass of 13 300kgs. Mr Mulder said that only one item had a mass of 13 300kgs – the base plate. Clearly the 'wing' is misdescribed.
- (f) Although hearsay evidence is admissible in Admiralty proceedings, the weight to be given to such evidence must also be assessed. The report from Usabiaga was clearly compiled with a view to future claims of damage to the crane. The loading process does not appear to have been carried out in a logical manner under the supervision, nor, indeed, observation of the staff of Usabiaga.
- (g) We are left with real doubt as to whether the missing parts of the crane actually arrived in Durban. This is complicated by the fact that when the crane was removed to Beira, parts not belonging to the crane were sent together with the crane – having been counted as part of the crane. Then there is the question of what physical cargo was in the staging area when the Virtual State Warehouse was declared?
- (h) Part of the difficulty in establishing the true facts is that it appears that the personnel responsible for counting and identifying the cargo

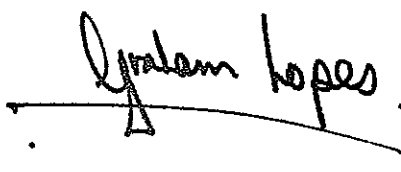
as it was offloaded from the ship, were probably not in a position positively to identify the various crane parts. This leads to a suggestion that it is uncertain whether all was delivered as it should have been.

[35] In all the circumstances, I am not persuaded that Transnet owed a duty of care to Mycsa, and, even if it did so, negligence on the part of Transnet has not been established. The pleadings were, in my view, insufficient to sustain the cause of action relied upon by Mycsa.

[36] There seems no reason why costs should not follow the result.

[37] I make the following order:

The plaintiff's claim is dismissed with costs, such costs to include those costs consequent upon the employment of two counsel, where employed.



Lopes J

Dates of hearing: 10th-11th March, 2020, and the 23rd – 25th August, 2021.

Date of judgment: 15th October, 2021.

For the plaintiff: PJ Wallis SC (instructed by Shepstone & Wylie Attorneys).

For the defendant: CJ Pammenter SC, with him AJ Boule (instructed by Neerajh Ghazi Attorneys).