Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA

(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

CASE No: AC 18/2001

In the matter of

THEODOOR JACOB DUYN Plaintiff

and

SHANGMING INTERNATIONAL (PTY) LTD Defendant

JUDGMENT DELIVERED : 9 SEPTEMBER 2002

MOOSA, J:

Introduction:

[1] This matter has a chequered history. The dispute first surfaced before this court in the exercise of its Admiralty Jurisdiction, under case number AC7/2001, when Penta Shipping (Pty) Ltd t/a Foreshore Ship's Agency ("Penta"), instituted

proceedings against KEB Enterprises CC ("KEB") for the return of a consignment of roller skates imported from China ("the goods"). In the papers Penta alleged that it wrongfully released the goods to KEB. KEB conceded that it had a right of retention over the goods as opposed to a right of ownership. The matter was resolved between the two parties and the terms of settlement were made an order of court. In terms of such order KEB agreed to return the goods to Penta who undertook not to release the goods to anyone without a court order or an agreement by all parties. Penta agreed to keep KEB Covered for the monetary value of the lien up to an amount of R50 000. Penta was required to sue out an interpleader within 10 days of the order to establish who is entitled to the delivery of the goods.

[2] Penta and Pacific International Lines (Pty) Ltd ("Pacific") instituted interpleader proceedings under case number AC 18/2001. Various parties were cited as claiments, amongst them were plaintiff and defendant in the instant case. On 7 August 2001, this court barred all claimants except plaintiff and defendant from making claims for the goods. The court further ordered that the dispute between plaintiff and defendant, with regard to the entitlement of the goods, be referred to trial. The plaintiff's particulars of claim as amended, stood as the declaration and defendant was directed to deliver its plea with or without a counterclaim and such

other pleadings as may be necessary. Penta and Pacific were ordered to deliver the goods to the successful party, subject to the compliance with certain conditions. Penta and Pacific were released from the further proceedings in this matter. The goods are presently held in container PC 19660685 at SA Consumer Depot, Ben Schoeman Deck, Table Bay Harbour, pursuant to the court order dated 7 August 2001.

Pleadings:

[3] The issue which this court is called upon to decide, is whether the plaintiff or defendant is entitled to the goods. In terms of plaintiff's declaration, as further amended and dated 30 November 2001, the relevant allegations to the dispute in question are as follows:

"2. 2.1 During or about August 2000 Second and Fifth Claimant concluded an agreement of co-operation and of sale, copies of which are annexed hereto marked "A" and "B", in terms whereof it was agreed, ***inter alia****, that*

2.1.1 Fifth Claimant would sell to Second claimant and export, or arrange for the export, from the People's Republic of China ("China") to the Republic of South Africa ("South Africa") of certain specified goods known as flying shoes (patent No

ZL962406198) ("Hirollers"), and

*2.1.2 Second Claimant would, on arrival of the goods in South Africa, attend to, **inter alia**, the clearance through the South African customs and the sale of the goods in South Africa.*

2.2 Fourth Claimant is a co-signatory on both annexure "A" and "B" on behalf of Second Claimant.

*3. Subsequently, and in October 2000, Second Claimant and Fourth Claimant concluded a partly oral and partly written agreement (a copy of the written portion of the said agreement is annexed marked "C") in terms of which Fourth Claimant would, **inter alia**,*

3.1 have the sole marketing rights of the Hirollers imported into South Africa; and

3.2 be entitled to receive and hold, possession of any Hirollers, including the goods, until sold; and

3.3 receive payment for any Hirollers sold, including the goods, and would, after deduction of an agreed sum equal to US$7.00 (incorrectly recorded in Annexure "C" as US$6.00) per pair of Hirollers sold, account to Second and/or Fifth Claimants.

4. …

5. …

6. Pursuant to the agreement, and as holder of the First Original Bill of Lading, Fourth Claimant is entitled to possession of the goods."

[4] Defendant admitted that the agreement was concluded as alleged in Clause 2.1 of the declaration, but denied that plaintiff was a co-signatory on annexures "A" and "B" for and on behalf of defendant. Defendant denied that it entered into an agreement with plaintiff as alleged in clause 3 of the declaration. In the alternative, defendant pleads that the liquidators of defendant elected not to abide by the said agreement and conveyed it as such to plaintiff. In its counterclaim, defendant makes the following relevant allegations pertaining to the dispute in question:

"4. During or about August 2000 and at China, Defendant, who at all relevant times hereto was represented by Ms Zheung, and Fifth Claimant, who at all relevant times hereto was represented by Mr Chen Chen, concluded a written agreement ("first agreement") of sale in terms of which Fifth Claimant:

4.1 would sell 10 000 cartons of shoes to Defendant;

4.2 *would deliver to Defendant an original bill of lading pertaining to the shoes.*

5. Pursuant to the first agreement Fifth Claimant:

5.1 sold 756 cartons of shoes ("shoes") to Defendant;

5.2 delivered an original bill of lading to Defendant with the intention to pass ownership of the shoes to Defendant, who received the bill of lading with the intention to acquire ownership thereof."

Plaintiff alleged in his plea to defendant's counterclaim, that he was a party to the agreement concluded in terms of clause 4 of the counterclaim and together with Celina Zheung ("Ms Zheung") represented defendant. Plaintiff further alleged that he was authorised by Ms Zheung to sign documents on behalf of defendant and which was later confirmed by the minutes of a meeting held on 3 November 2000. He denied the other allegations in clauses 4 and 5. I have attempted to summarise the pleadings in a manner that brings out the issues which have a bearing on the dispute in question between plaintiff and defendant. In such summary I have left out those issues which were either not relevant, or had a bearing on other parties.

Admissions:

[5] Plaintiff made certain admissions in the pre-trial conference. Amongst others, to which I shall return later, plaintiff admitted that, for his claim, he is relying on a written partnership agreement which he allegedly entered into with Ms Zheung. Plaintiff also admitted that he is further relying on an agreement between the

partnership and defendant in terms of which the partnership was given the sole marketing rights of the goods by Ms Zheung, acting on behalf of defendant. Plaintiff further admitted that the factual averments made in the inchoate agreement dated 15 November 2000 (exhibit "O"), are correct. The relevant averments are that the corporation is the beneficial owner of the goods which were imported to South Africa from China at the request of defendant who was appointed as the sole distributor of the goods in South Africa. Plaintiff had claimed that he was a 50% shareholder in defendant or a 50% profit share partner in the proceeds of the goods and that he, in his personal capacity, is entitled to certain remuneration. Plaintiff's evidence in the trial was substantially in accordance with these admissions. These admissions and the evidence clearly indicate that the goods were imported at the instance of defendant.

Backdrop:

[6] Most of the facts are either common cause, undisputed or admitted. The backdrop to the case can be summarised as follows: Ms Zheung interested plaintiff in the importation of the shoes from China for the purpose of marketing them in South Africa. Pursuant thereto, Ms Zheung and plaintiff travelled to China where they met Mr Chen Chen who represented Tianjin Strait General Corporation ("the Corporation") and Tianjin Strait Industrial Trading Company

Ltd ("the Trading Company"). A deal was struck with the Trading Company in terms of which the goods would be imported by defendant. The parties concluded a co-operation agreement and a sales confirmation contract which are exhibits "A" and "B". Both these agreements are dated 28 August 2000. I will return to them later. A further agreement was concluded between Shanghai Guo Yue Hua Sports Goods Co Ltd ("the Sports Co") who was the patent holder of the goods and the Shangming International Group ("the Group"), in terms of which the latter was appointed as the sole distributor of the goods in South Africa. The last signature to this agreement is dated 1 September 2000. This agreement is exhibit "LL".

[7] The goods were shipped from Shanghai via Singapore by the Shanghai Foreign Trade Enterprises Corporation ("the shippers"). The relevant invoices and sales confirmation documents were made out by the shippers in the name of the group (exhibits "K", "L", and "M"). The bills of lading were made out by the shippers to Shangming International (exhibits "I" and "J"). Mr Kevin Moodley, the regional director of Penta, who testified for plaintiff, said in shipping matters there are usually three original signed bills of lading. They are described as the first, second and third original bills of lading. The holder of any one of the bills of lading who presents it first to the agent of the shippers, is entitled to the delivery

of the goods described therein. In such event the remaining two bills of lading become void. The bill of lading describes the position as follows:

> *"One of the signed bills of lading must be surrendered duly endorsed in exhange for the goods or delivery order. On presentation of this document, duly endorsed, to the carrier by or on behalf of the holder, the rights and liability arising in accordance with the terms hereof, shall be binding in all respects between the carrier and the holder as though the contract evidenced hereby had been made between them."*

Agreements:

[8] Ms Zheung, acting on behalf of defendant entered into an agreement with plaintiff, in terms of which defendant would be responsible for all activities connected with the importation of the goods into South Africa and plaintiff would be responsible for the marketing of the goods in South Africa. It was further agreed that the nett profit derived from the sale of the goods would be shared on a 50/50 basis between Ms Zheung, acting for defendant and the plaintiff. It was also agreed that any party that assisted with the importation of the goods would share in the percentage of profit earned by defendant and any party that assisted plaintiff with the marketing of the goods, would share in the percentage earned

by plaintiff. This agreement was confirmed by plaintiff and Mr Horak in their evidence.

[9] Plaintiff, pursuant to his mandate, instructed his daughter, Ms J Duyn, to conduct a survey at schools with regard to the marketability of the shoes through the schools. He also instructed Mr Chaimowitz to market the goods commercially. The latter connected with Mr Brookes of KEB who interested Clicks Stores Ltd ("Clicks") to sell the goods on a consignment basis through its stores. However, by the time the goods landed in Cape Town the relationship between the parties had soured to such an extent that various allegations and counter-allegations were made. The incriminations eventually culminated in certain civil litigation being instituted against various parties and some of the parties laying criminal charges against each other. The goods were initially released to KEB on the basis of the second original bill of lading. Plaintiff challenged the release of the goods as unlawful and threatened to hold Penta liable for damages. Penta went to court to secure the return of the goods. The first original bill was handed in as exhibit I by plaintiff. He explained that it was delivered by DHL to his address. Mr Horak testified that exhibit I was kept at the offices of defendant which was located at premises owned by plaintiff. Clicks entered the fray and threatened to withdraw from the transaction if the parties did not resolve their differences. A

draft settlement agreement (exhibit "O") was prepared. All the relevant parties signed the agreement except Mr Brookes of KEB. This effectively scuttled the settlement agreement.

[10] It is common cause that defendant and the Trading Company concluded an agreement of co-operation and of sale of the goods as evidenced by exhibits "A" and "B". Such agreements were signed by both Ms Zheung and plaintiff on behalf of defendant. Defendant denied that plaintiff had authority to sign on behalf of defendant. Plaintiff alleged that Ms Zheung had authorised him to sign the documents on behalf of defendant. It is also common cause that plaintiff had no shares in defendant company. Plaintiff's evidence, which is not disputed, is to the effect that he had an option to acquire 510 ordinary shares in defendant from Ms Zheung. In support thereof he tendered exhibits "D" and "E". Exhibit "D" is the minutes of a meeting of directors of defendant, held at Somerset West on 3 November 2000 which confirms, **inter alia**, (i) that Ms Zheung owns 90% of the shares in defendant; (ii) that she has signed the share transfer form; (iii) that plaintiff has the option to acquire the shares; and (iv) that plaintiff is authorised to sign any company documents relating to the goods. Exhibit "E" is the securities transfer form duly signed by Ms Zheung. It is not clear in what capacity plaintiff signed exhibits "A" and "B", but the court accepts the fact that he

was authorised by Ms Zheung to sign the documents. However, not much turns on this point.

[11] Ms Sangiorgio, a co-liquidator of defendant, testified that according to the records, Ms Zheung was the only director of defendant. There is no evidence that plaintiff was ever appointed a director of the company, nor does he claim that he was in fact a director of the company. Both exhibits "A" and "B" bore the stamp "Shangming International Group" below the name of defendant. The sole distribution agreement, exhibit "LL" also bore the stamp of the group. The only reasonable inference one can draw from such association is that the group has been conflated into defendant. The invoices and the sales confirmation documents, exhibits "K", "L" and "M" which are made out in the name of the group, are consistent with this inference. I am fortified in this conclusion by the letterhead of the group (exhibit "SS") which reflects the registration number of the group as 93/07180/07 which corresponds with the registration number of defendant. In this regard, see the securities transfer form, exhibit "L". The bill of lading, on the other hand, is made out to Shangming International. It is neutral in relation to "(Pty) Ltd" and "Group", thus leaving the option open to both eventualities.

[12] Plaintiff stakes his claim of entitlement to the goods on a partly oral and partly written agreement concluded in and during October 2000 between plaintiff and defendant. According to plaintiff, the partly written agreement is contained in exhibit “F”. This agreement is signed by plaintiff and Ms Zheung. Defendant denied that such agreement was concluded between plaintiff and defendant. Mr Horak testified that Ms Zheung concluded such agreement under duress, and as a result thereof she laid a charge of assault against plaintiff. Plaintiff admitted that the charge was laid, but denied that she signed the agreement under duress. Ms Zheung did not testify in the matter. The evidence of Mr Horak that she signed under duress, in the face of the denial by plaintiff, has very little if any probative value. In any event, the terms of the agreement are consistent with the admitted evidence and the probabilities. In my view a joint venture was established between plaintiff and defendant. Pursuant to such joint venture, plaintiff and Ms Zheung travelled to China, negotiated the importation and sale of the goods to defendant with Mr Chen Chen. This accounts for the fact that both Ms Zheung and plaintiff signed exhibits “A” and “B” on behalf of defendant. I am fortified in this conclusion, firstly, by the fact that responsibility for the importation of the goods on the one hand, and for the sale of the goods, on the other hand, was allocated to defendant and plaintiff respectively; secondly, that the profits earned in such joint venture would be shared between plaintiff and defendant on

a 50/50 basis; and, thirdly, that plaintiff would account to defendant and/or the Trading Company for the nett proceeds of the sale of the goods as admitted by plaintiff in the pleadings.

Evaluation:

[13] There is no evidence, whether orally or in writing, to support plaintiff's allegations in the pleadings that he was entitled to receive and hold possession of any Hirollers, including the goods, until sold. There is also no evidence from which such inference can be drawn. Plaintiff relied on the fact that he was the holder of the first original bill of lading to support his claim. It is true that plaintiff, at the trial, handed in as evidence the first original bill of lading. Mr Horak testified that defendant had its office at the premises of plaintiff and plaintiff had access to such offices. In any event, Mr Moodley testified that any one of the three original bills of lading is valid and on presentation and surrender of any one of them, the others become void. This also appears to be the position from the bill of lading. Mr Moodley testified that on 22 November 2000, Ms Zheung and Mr Chen Chen handed him an original bill of lading on behalf of defendant. Mr Horak testified that before 19 October 2000, he and Ms Zheung attended the offices of Mr Howard Tripp of HT Marketing, who was the clearing agent for KEB. Ms Zheung presented the first original bill of lading to him, together with the invoice, exhibit

"M". She was not prepared to leave the original documents with Mr Tripp. He made copies and returned the originals. It was agreed that the original documents would be handed to him when the goods were cleared. It appears that the goods were cleared by Mr Tripp, on the strength of the second original bill of lading. This accounts for the fact that the plaintiff is still in possession of the first original bill of lading.

[14] Plaintiff admitted that the contractual rights he had acquired through the joint venture, devolved upon him through the defendant. Plaintiff admitted further that the corporation is the beneficial owner of the goods that was imported to South Africa from China at the instance of defendant. He admitted further that defendant was appointed as the sole distributor of the goods in South Africa. It is common cause that this right was transferred and/or ceded by defendant to plaintiff and the profit derived from such transaction would be shared on a 50/50 basis between plaintiff and defendant. It therefore follows that defendant has the right to the goods and plaintiff has the right to sell the goods. There is no evidence before this court that plaintiff has the right to the delivery of the goods. The fact that he has acquired the sole selling rights to the goods, does not entitle him to possession thereof. Plaintiff has further conceded that Ms Zheung would be responsible for the importation quality control and financial arrangements

regarding the goods. The obligation to clear the goods from customs, inland transportation, warehousing and selling the goods in South Africa was delegated by Mr Chen Chen, acting on behalf of the Trading Co, to Ms Zheung in her capacity as director of defendant. This appears from the co-operation agreement, exhibit "A". The overwhelming evidence is to the effect that defendant has entitlement to the goods and plaintiff has the sole right to sell the goods. I am fortified in this conclusion by the fact that plaintiff has subsequently elected to sue various parties connected with this transaction, for damages arising from breach of contract.

Costs:

[15] Mr **Roux**, counsel for defendant, asked that costs be awarded against plaintiff on an attorney and client scale. He submitted that despite various admissions made by plaintiff which effectively vested entitlement of the goods in defendant, plaintiff still persisted with his case. Plaintiff is a lay person who conducted his own case. It is not fair to penalise a lay person simply because he is not aware of the intricacies of the law. Access to the courts is guaranteed by the constitution and the court is enjoined to give effect to such right in the interests of the administration of justice. I am not convinced that, in the circumstances of this case, I should award costs against plaintiff on an attorney and client scale. I am

prepared to make the usual order that the unsuccessful party bears the costs of the proceedings. These costs

are to include the costs awarded by **Griesel, J** in terms of clause 4 of the court order, dated 7 August 2001.

Order:

[16] In the premises, Penta Shipping (Pty) Ltd and/or Pacific International Lines (Pty) Ltd ("applicants") are ordered to deliver the goods stored in container PC 19660685 at SA Container Depot, Ben Schoeman Dock, Table Bay Harbour, or at any other place, to Shangming International (Pty) Ltd (in liquidation), subject to

(i) the surrender of an original bill of lading duly endorsed, unless previously done;

(ii) payment of all accrued costs; and

(iii) payment or security for payment of applicants' costs of suit as taxed or agreed.

Plaintiff is ordered to pay defendant's costs, which shall include the costs of the applicants as ordered by **Griesel, J** in terms of clause 4 of the court order dated 7 August 2001.

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